

Measuring the Testator: An Empirical Study of Probate in Jacksonian America

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I. INTRODUCTION

In the midst of several flourishing areas of legal scholarship—the empirical analysis of law;¹ analysis of the law’s disparate treatment of men and women;² continued interest in legal history;³ and wills, trusts, and

¹ For empirical studies related to the probate process, see Stephen Duane Davis II & Alfred L. Brophy, “*The Most Solemn Act of My Life*”: *Family, Property, Will, and Trust in the Antebellum South*, 62 ALA. L. REV. 757 (forthcoming 2011), available at <http://ssrn.com/abstract=1398522> (2009) (Greene County, Alabama from 1831–1835 and 1841–1845); Lawrence M. Friedman, Christopher J. Walker & Ben Hernandez-Stern, *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 HOUS. L. REV. 1445 (2007) (San Bernardino County, California in 1964). For empirical analyses in other areas of law, see George S. Geis, *Automating Contract Law*, 83 N.Y.U. L. REV. 450, 458–60 (2008) (discussing and assessing the state of empirical analysis of contract law); Joanna M. Shepherd, *Tort Reforms’ Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 929–42 (2008) (empirical analysis of the relationship between medical malpractice tort reform and accidental death rates); Gregory C. Sisk, Michael Heise & Andrew P. Morris, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 492 (2004) (finding that religion was the most prominent influence on judicial decisionmaking of judges in religious freedom decisions studied).

² See Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIAC PROB. L.J. 36, 54 (2009) (intestacy more likely to affect traditionally lower socio-economic classes, including women); Kristine S. Knaplund, *The Evolution of Women’s Rights in Inheritance*, 19 HASTINGS WOMEN’S L.J. 3, 39 (2008) (concluding that 1890s Los Angeles was in some ways more progressive than other parts of the country with respect to women’s rights).

³ See, e.g., Alfred L. Brophy, *Property and Progress: Antebellum Landscape Art and Property Law*, 40 MCGEORGE L. REV. 603 (2009) (showing the connection between antebellum views of property found in cases, treatises, orations, essays, and fiction and Antebellum Era landscape art); Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1305 (2007) (concluding that the Founders inherited their expectations of how the Constitution would be construed from Anglo-American jurisprudence); Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385 (2006) (analyzing early American property laws regarding creditors, and their impact on economic development, slavery, and federalism); Claire Priest, *Currency Policies and Legal Development in Colonial New England*, 110 YALE L.J. 1303 (2001) (arguing that

estates⁴—lie substantial questions about the functions the probate process performs and how testators employ it.⁵ How do devises by male and female testators differ?⁶ How is the probate process used to keep property within the family or to distribute it to different family members?⁷ And how does the intestate system compare with what testators actually do with their property when they execute a will?⁸

This Note provides an empirical study of wills from Hamilton County, Indiana in the years leading to the Civil War in order to systematically and quantitatively address many of those questions. It surveys all of the eighty-one extant Hamilton County wills probated between 1838 and 1857 to discover who used the probate process and what testators did with their property. It reveals the use of probate to keep property in the family, the use of implicit testamentary trusts to provide for loved ones after the testator's death, and the ways that testators by and large tried to treat their heirs equitably. These issues of family equity and the rights of testators and their family members are central to the work done by legislatures, lawyers, and probate courts. This Note attempts to add to the body of studies examining how testators have behaved historically, and seeks to contribute to the knowledge of how legal technology has developed in history.

In addition to these larger questions about the probate process, this Note also adds nominally to the knowledge of nineteenth-century America's expanding market economy by providing data on the nature of the market in

an examination of colonial currency policies, contractual obligations, and litigation disrupts the scholarly consensus on the role of the legal system in colonial New England's economy).

⁴ See Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27 (2008) (arguing against common misconceptions regarding holographic wills); Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057 (1996) (attempting to show structural inconsistency within the field of inheritance law); Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609 (2009) (developing a theoretical framework for determining when lawmakers should interfere in order to revise wills).

⁵ For a recent treatment of such questions, see LAWRENCE FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* (2009).

⁶ See, e.g., Knaplund, *supra* note 2, at 21 (noting differences between estate distribution by males and females).

⁷ See generally Davis & Brophy, *supra* note 1.

⁸ See DiRusso, *supra* note 2, at 59 (individual's perspective on where property belongs is superior to intestacy schemes); Friedman et al., *supra* note 1, at 1457–58 (comparison of distribution to heirs of those dying testate and intestate). For an attempt at discerning people's intent vis-à-vis intestacy schemes, see also Mary Louise Fellows, Rita J. Simon & William Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319 (presenting results of a telephone survey of persons in Alabama, California, Massachusetts, Ohio, and Texas regarding their distributive preferences).

one county in Indiana early in its period of expansion and development. Many scholars of Jacksonian America have drawn attention to the importance and power of the market;⁹ fewer have focused on the probate system's ability to elucidate market participation.¹⁰

There have been similar studies of testation in counties and geographic regions throughout the United States, covering times from the colonial period to the twentieth century, that have asked similar questions about the probate system.¹¹ Such studies are necessarily selective in geographic region and time period surveyed, so important questions still remain about whether patterns of testation differ amongst the various regions of the United States. There has not yet been a comprehensive study of these questions regarding testation in the old Northwest (what is today considered the Midwest).¹² This

⁹ See generally DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848* (2007); CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815–1846* (1991).

¹⁰ See, e.g., MARTIN BRUEGEL, *FARM, SHOP, LANDING: THE RISE OF A MARKET SOCIETY IN THE HUDSON VALLEY, 1780–1860* (2002) (using probate records, among other things, in order to trace the development of a market society in the Hudson Valley); DEBORAH A. ROSEN, *COURTS AND COMMERCE: GENDER, LAW, AND THE MARKET ECONOMY IN COLONIAL NEW YORK* (1997) (arguing, based in part upon New York probate records, that the market revolution's beginnings lie in the eighteenth century).

¹¹ In addition to those studies already mentioned, see Edward V. Carroll & Sonya Salamon, *Share and Share Alike: Inheritance Patterns in Two Illinois Farm Communities*, 13 J. FAM. HIST. 219 (1988) (two Illinois farm communities, from the late nineteenth and early twentieth centuries); James W. Deen, Jr., *Patterns of Testation: Four Tidewater Counties in Colonial Virginia*, 16 AM. J. LEGAL HIST. 154 (1972) (four tidewater counties in Virginia, from 1660–1719); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963) (Cook County, Illinois, from 1953 and 1957); Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34 (1964) (Essex County, New Jersey, from 1850, 1875, and 1900); Edward H. Ward & J.H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393 (Dane County, Wisconsin from 1929, 1934, 1939, 1941, and 1944).

¹² There has been a fair amount of collection and organization of wills from the old Northwest. See, e.g., N.B. Mavity, *Early Wills of Orange County, Indiana (Abstracts and Notes)*, 34 IND. MAG. HIST. 384 (1938); N.B. Mavity, *Early Wills of Orange County, Indiana (Abstracts and Notes)*, 34 IND. MAG. HIST. 501 (1938); N.B. Mavity, *Early Wills of Orange County, Indiana (Abstracts and Notes)*, 35 IND. MAG. HIST. 121 (1939). Mavity's three-part article is little more than an annotated list of wills, including testator, date of execution, date of probate, legatees, and sometimes executors and witnesses. There are likely many such annotations of will records for counties across the old Northwest, though the wills themselves remain for the most part unstudied. For an early study of one specific aspect of testation, see Earl E. McDonald, *Disposal of Negro Slaves by Will in Knox County, Indiana*, 26 IND. MAG. HIST. 143 (1930) (listing examples of wills from Knox County, Indiana—whose settlers were French and had held slaves prior to the Revolution—in which slaves were left to heirs). More recently, William Newell

Note will begin to sketch what may one day become a fuller picture of testation and legal technology in the nineteenth-century Northwest.

In this respect, this Note provides an important comparison to the recent study by Stephen Davis and Alfred Brophy, who identified the pre-Civil War era as an important period for the study of testation and the probate system.¹³ Davis and Brophy examined the probate process in affluent Greene County, Alabama in the years 1831–1835 and 1841–1845.¹⁴ They found important differences between male and female testators,¹⁵ and extensive use of trusts to treat male and female beneficiaries differently.¹⁶ They used this data in conjunction with other literature of the period to draw conclusions about the nature of family relations,¹⁷ legal technology,¹⁸ and the ideas about inheritance of a slave society.¹⁹ This Note examines similar issues with its eye trained on a county north of the Mason-Dixon line in order to test some of the findings of Davis and Brophy. In so doing, this Note thus seeks to present a clearer picture of similarities and differences in patterns of testation between North and South in the years leading to the Civil War. It theorizes that differences in distribution are likely due to testators' different levels of wealth and the different functions performed by family members in the North and South.

Part II explains the methodology employed in the collection and analysis of wills. Part III presents the context in which the wills must be read—including an examination of Hamilton County, discussion of the tumultuous condition of Indiana's intestate scheme in the years 1838–1857, and a glance

has conducted an exhaustive study of wills from Butler County, Ohio, for the years 1803–1865 (examining all 1151 testators for the period studied), resulting in chapters published in two different volumes: William H. Newell, *Inheritance on the Maturing Frontier: Butler County, Ohio, 1803–1865*, in LONG-TERM FACTORS IN AMERICAN ECONOMIC GROWTH 261 (Stanley L. Engerman & Robert E. Gallman eds., 1986) [hereinafter Newell, *Inheritance on the Maturing Fronteir*]; William H. Newell, *The Wealth of Testators and Its Distribution: Butler County, Ohio, 1803–65*, in MODELING THE DISTRIBUTION AND INTERGENERATIONAL TRANSMISSION OF WEALTH 95 (James D. Smith ed., 1980). Newell's studies—which focus on the transmission of wealth from testators to their children and include a discussion of and hypothesis about the reason for the sexist patterns of transmission found in Butler County wills—are examples of detailed social science analysis, but they do not attempt to place the data into its legal context, leaving to the side such issues as estate transmission to widows vis-à-vis intestacy schemes and the developing legal technology of the trust.

¹³ Davis & Brophy, *supra* note 1, at 6.

¹⁴ See *id.* at 22–51.

¹⁵ See *id.* at 32–34.

¹⁶ See *id.* at 34–41.

¹⁷ See *id.* at 50.

¹⁸ See *id.* at 50–51.

¹⁹ Davis & Brophy, *supra* note 1, at 6–12.

at some issues that were being litigated in Indiana in connection with the legislation passed during this period. Part IV presents the findings of the study—who the testators were and what they did with their wealth—as well as a comparison to the findings of Davis and Brophy. Part V concludes the Note and suggests areas of future research.

II. METHODOLOGY

The methodology used here follows aspects of two empirical studies of wills: the San Bernardino County, California study by Lawrence Friedman, Christopher Walker, and Ben Hernandez-Stern,²⁰ and the Greene County, Alabama study by Stephen Davis and Alfred Brophy.²¹

Wills were collected from the Hamilton County, Indiana, microfilm department located in Noblesville, the Hamilton County seat. The wills were contained in several will books, which were also preserved on microfilm. The earliest available books included wills from as early as the 1820s through the 1860s, as well as estate inventories of some who died intestate. This study examines the eighty-one extant wills that were probated between 1838 and 1857. For each will that was examined, the following data were collected: gender, year the will was executed, year of probate, marital status, testator's issue, testator's objects of bounty, portion of estate and interest conveyed to spouse, equality of distribution by testators with more than one child, and the presence and purpose of trusts. For purposes of comparing certain key data, the testators were split into three chronological groups corresponding with the relevant legislation regulating descent and dower: 1838–1842; 1843–May 5, 1853; and May 6, 1853–1857.²²

III. CONTEXT

This section describes the context in which the wills here studied must be understood. It begins with a description of the setting: Hamilton County, Indiana. In the twenty or thirty years between the settlement of Hamilton County and the time period analyzed by this Note, Hamilton County was transformed from a forest to a thriving society in which mills and other implements of industry were erected, from which farmers could drive hogs all the way to Cincinnati for sale, and through which a railroad ran. It was in this thriving market economy that testators made the living that they would

²⁰ Friedman et al., *supra* note 1, at 1453–55.

²¹ Davis & Brophy, *supra* note 1, at 27.

²² The Act passed in 1852 did not take effect until May 6, 1853. *Hendrickson v. Hendrickson*, 7 Ind. 13, 16 (Ind. 1855). Because the effective dates of the 1838 and 1843 acts are not clear, testators were placed into their respective categories based on the date of probate as compared to the dates on which the relevant legislation was passed.

pass on to their loved ones.

The history of Hamilton County, however, is not a broad enough context in which to understand these wills. It is necessary to know something of the legal context in which they were written. In this regard, Indiana's intestate law was marked by major upheaval in the period from 1838 to 1852, culminating in the abolition of dower in 1852. The intestate scheme passed in 1838 was revised in 1843 to provide less property for widows, and the scheme was revised again in 1852 to provide more property for widows than the 1838 legislation. These new statutes changed the share that a widow would receive from a husband dying intestate. Because the intestate scheme is the background against which a testator's choices are understood,²³ this context is essential to a proper understanding of testation in the period 1838 to 1857.

A. Historical Context: Hamilton County, Indiana

Hamilton County lies in central Indiana and was formed from part of the lands of Marion County in an act passed by the Indiana legislature on January 8, 1823.²⁴ For much of its history—and certainly from 1840 to 1852—Hamilton County has been predominantly farm land, nourished by the White River and its tributaries.²⁵

The settlement of Hamilton County began in 1819. In 1818 the United States purchased the land that included what would become Hamilton County, and in 1819 seven or eight families left from Connersville, trekking across seventy miles of forest to a spot near where Noblesville now lies, settling in a location which the settlers called Horseshoe Prairie because of

²³ See JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS, AND ESTATES* 71 (8th ed. 2009).

²⁴ AUGUSTUS FINCH SHIRTS, *A HISTORY OF THE FORMATION, SETTLEMENT AND DEVELOPMENT OF HAMILTON COUNTY, INDIANA, FROM THE YEAR 1818 TO THE CLOSE OF THE CIVIL WAR* 45–46 (1901).

²⁵ FRANK S. CAMPBELL, *THE STORY OF HAMILTON COUNTY INDIANA* 105 (1962). Campbell notes that at times Hamilton County has endured large floods, including a large flood in 1847:

Fences were washed away, grain that had been left in the fields floated downstream, sometimes livestock was seen riding the shocks of corn as they floated away. By this time there was a dam and a mill . . . and these were both washed away. At the west end of Conner Street the river came over the bank and flowed south through the old canal. Because the water came up several times in the southwest part of town . . . its residents sometimes had to leave their homes by boat.

Id. at 106. In addition to this destruction, the flood of 1847 also destroyed some of Hamilton County's probate records.

the shape of the river around the settlement.²⁶ At the time of this purchase, there was only one white man in what would become Hamilton County—William Conner.²⁷ Conner and his brother John, who lived near Connersville, each carried on a trading post—John receiving supplies from the Ohio River, and William receiving supplies from John.²⁸

Farming had a slow beginning in Hamilton County because stumps from the clearance of timber could only be removed by the passage of time.²⁹ Once the stumps from the timber had gone, wheat was sown in the fall and corn was planted in the spring.³⁰ Threshing machines and windmills, used in the wheat harvest, were introduced around 1840.³¹ In addition to corn and wheat, in 1840 Hamilton ranked second among Indiana counties in the production of hemp and flax, fifth in sugar production, and tenth in production of potatoes.³² By 1850 Hamilton County's rank in each of these crops had fallen, though it was the seventh highest Indiana county in value of orchard products.³³ Hamilton County farmers also raised livestock, and by 1835 farmers were able to produce a surplus of cattle and hogs.³⁴ The primary market for these goods—since it was the largest market within reasonable proximity to Hamilton County—was Cincinnati, which in the early days could mean a three-week round trip for the sale of livestock.³⁵ Merchants also traveled to Cincinnati to purchase wares to be brought back to Hamilton County for sale in the fall and spring.³⁶

Industrialization in Hamilton County began soon after its settlement with the construction of several different kinds of mills, a dam, and other technological developments whose efficiency impacted both production and domestic life. In 1820 the settlers, including John Finch, built a small horse mill for grinding corn, which served several new Indiana settlements,

²⁶ Fabius M. Finch, *Reminiscences of Judge Finch*, 7 IND. MAG. HIST. 155, 156 (1911).

²⁷ SHIRTS, *supra* note 24, at 7.

²⁸ *Id.* at 8. The Conners were likely aided in these endeavors, which of course included trade with Native Americans, because they had been taken by Native Americans when young, and thus had each married Native American wives. *Id.* at 7–8.

²⁹ *Id.* at 42–43.

³⁰ *Id.* at 43.

³¹ *Id.* at 43–44.

³² Dep't of State, 3 Compendium of the Enumeration of the Inhabitants and Statistics of the United States 280 (1840).

³³ J.D.B. DeBow, United States Census, 1 The Seventh Census of the United States 793, 796 (1850).

³⁴ SHIRTS, *supra* note 24, at 283.

³⁵ *Id.* at 284.

³⁶ *Id.*

including some as far away as Indianapolis.³⁷ The first water mill was built in 1821.³⁸ John Conner contracted for a dam, a grist mill, and a saw mill to be built in the summer of 1823.³⁹ One Francis B. Cogswell moved to Noblesville in 1825 and opened the county's first tanyard.⁴⁰ James Casler built a distillery in 1826.⁴¹ Domestic technology also improved during this early period with the introduction of the spinning jack, patent loom, sewing machine, and cooking stoves.⁴²

The first railroad to be built through Hamilton County was the Peru and Indianapolis Railroad, which was authorized in 1846.⁴³ Stock in the railroad was sold both to counties and individuals, though it is reported that "the only dividends ever paid the stockholders was a free ride."⁴⁴ In 1848 Hamilton County commissioners ordered levies on income, polls, and acreage for

³⁷ *Id.* at 14. Finch, one of the testators whose will is included in this Note, was reportedly "a fine mechanic, and a good blacksmith." *Id.* Finch gave to one of his sons, Fabius, two hundred dollars and made him one of two executors of his will. John Finch's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 18, 18. Fabius M. Finch was admitted to the Indiana bar in May, 1831 and served as Circuit Court Judge in 1842. SHIRTS, *supra* note 24, at 69, 71. Fabius Finch also provided personal reflections on the settlement of Hamilton County, concluding that:

What the privations and sufferings of these men and women procured, we enjoy the fruits of now. The reflection to be deduced from these facts is, that as all excellence is the product of suffering in some form . . . so we who are the inheritors of this suffering ought to show an advance in every beneficial progress of life which has been made since then, and I think we do.

Finch, *supra* note 26, at 165.

³⁸ SHIRTS, *supra* note 24, at 21.

³⁹ *Id.*; J.G. Finch, *Settlement of Noblesville, Hamilton County*, 6 IND. MAG. HIST. 75, 79 (1910).

⁴⁰ SHIRTS, *supra* note 24, at 37.

⁴¹ *Id.* at 38. This distillery became a site of weekly entertainment, with those who enjoyed sport gathering on Saturdays:

Turkeys, deer hams, deer and 'coon skins were usually brought there and sold to men who attended shooting matches. Tickets were sold at a certain price for each shot until the price of the turkey was made up, then the best shot won the turkey. The shots were at a mark usually forty yards distant. The day was usually passed in shooting, drinking, foot racing, wrestling, and a fist fight.

Id. at 39.

⁴² *Id.* at 44.

⁴³ CAMPBELL, *supra* note 25, at 121.

⁴⁴ *Id.* John N. Berreman was one such stockholder. Berreman left to his two sons "[t]he remainder of my Estate, each and every parcel thereof, including my share of stock in the Peru and Indianapolis Railroad Company." John Berreman's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 134, 135. Where necessary, the author has made changes to spelling and punctuation to enhance readability of the wills.

railroad purposes.⁴⁵ The first train came to Noblesville on March 12, 1851.⁴⁶

Turning to population and demographics, Hamilton County experienced reasonable growth during the period from 1840 to 1850. In 1840 the population was 9,855.⁴⁷ By 1850 that number had climbed to 12,684.⁴⁸ The percentage increase in population—28.7%—may be considered moderate growth, although it was proportionally less than the state mean of 44.1%.⁴⁹

By 1850, more than 40% of Hamilton County residents had been born somewhere other than Indiana. These residents represented several states and countries. United States-born Hamilton County residents had come from Ohio, North Carolina, Pennsylvania, Virginia, Kentucky, Maryland, Tennessee, New York, and New England.⁵⁰ In addition to these United States-born residents, Hamilton County had also become home to people from Germany, Ireland, England, France, Canada, Scotland, and Wales.⁵¹ Between 1840 and 1850 Hamilton County also experienced growth in what the U.S. Census termed “Free Colored.” In 1840, there were sixty-seven Free Colored citizens,⁵² comprising just 0.7% of the Hamilton County population; by 1850 this number had jumped to 182, or 1.4% of the population.⁵³ While this number seems low, it was above the state mean of 1.14%, probably because of Hamilton County’s proximity to a tributary of the Ohio River.⁵⁴

B. Legal Context: Indiana’s Intestate Scheme: 1838–1857

A state’s intestate scheme is the default standard against which a testator’s will should be measured.⁵⁵ The period considered in this Note—1838 through 1857—saw a great deal of legislative action surrounding intestacy, with two significant changes taking place in the period between 1838 and 1853. This legislation was concerned with the share to be given to the widow of one dying intestate, and thus is important in the study of testation in this period. In short, this period saw the Indiana legislature

⁴⁵ SHIRTS, *supra* note 24, at 89.

⁴⁶ CAMPBELL, *supra* note 25, at 122.

⁴⁷ Dep’t of State, 1 Sixth Census or Enumeration of the Inhabitants of the United States 352 (1840).

⁴⁸ DeBow, *supra* note 33, at 755.

⁴⁹ *Id.* at 781.

⁵⁰ Gregory S. Rose, *Hoosier Origins: The Nativity of Indiana’s United States-Born Population in 1850*, 81 IND. MAG. HIST. 201, 206–08 (1985).

⁵¹ Gregory S. Rose, *The Distribution of Indiana’s Ethnic and Racial Minorities in 1850*, 87 IND. MAG. HIST. 224, 232 (1991).

⁵² Dep’t of State, *supra* note 47, at 81.

⁵³ DeBow, *supra* note 33, at 755.

⁵⁴ See Rose, *supra* note 51, at 250.

⁵⁵ See DUKEMINIER ET AL., *supra* note 23.

decrease the widow's share of an intestate's estate in 1843 before greatly expanding the widow's rights to her deceased husband's property under the legislation of 1852, which took effect on May 6, 1853.⁵⁶

1. *The Legislation of 1838*

Disposition of the property of those dying intestate at the beginning of the period studied in this Note was governed by the intestate scheme found in a legislative act regulating descents, distribution, and dower which was approved February 17, 1838.⁵⁷ Under this scheme, the default rule for the widow's share of the decedent's personal estate was one-third of the personal property after the payment of debts, with a guarantee of \$100 of the personal estate at the time of valuation with no obligation to creditors.⁵⁸ The widow's right of dower was a life estate in one-third of the real estate to which her husband was legally or equitably entitled.⁵⁹ In general, dower provided additional protection for a widow in at least two ways: it trumped the rights of creditors, and it allowed the widow to claim dower in lands that her husband had conveyed without her consent.⁶⁰

In addition to these provisions—which, under the 1838 statute, applied when the intestate was survived by any issue⁶¹—there were certain situations in which the widow was entitled to more of the estate. If the deceased had no issue but was survived by at least one parent or sibling, then the widow

⁵⁶ *Hendrickson v. Hendrickson*, 7 Ind. 13, 16 (Ind. 1855). Emily Hendrickson, widow of John, received a life estate in one-third of her husband's land rather than in fee simple because he died in December 1852 and the Act had not yet taken effect. *Id.*

⁵⁷ THE REVISED STATUTES OF THE STATE OF INDIANA 236–40 (1838) [hereinafter REV. STAT. 1838].

⁵⁸ *Id.* at 238.

⁵⁹ *Id.* at 238–39. The language of the legislation does not specify whether the widow's dower interest is a life estate or a fee simple, but toward the end of the period covered by this Note the Indiana Supreme Court heard a case involving one Mary Lefforge, who “had a life estate as a tenant in dower.” *Lefforge v. West*, 2 Ind. 514, 514 (Ind. 1851). For a short summary of the original concept of dower, see Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 738 (2006).

⁶⁰ FRIEDMAN, *supra* note 5, at 23. For factors contributing to the decline of dower, see *infra* note 86.

⁶¹ Friedman notes that early American intestate law deviated from English rules like primogeniture. See FRIEDMAN, *supra* note 5, at 20–21. Thus, the intestate's issue inherited equal shares, with the children of any deceased children of the intestate dividing equally the share of their deceased parent. See REV. STAT. 1838, *supra* note 57, at 236; THE REVISED STATUTES OF THE STATE OF INDIANA 433 (1843) [hereinafter REV. STAT. 1843]; THE REVISED STATUTES OF THE STATE OF INDIANA 248 (1852) [hereinafter REV. STAT. 1852].

received two-thirds of the personal estate and one-third of the real estate after payment of the estate's debts.⁶² If the deceased was survived by no parents or siblings, but at least one grandparent, aunt, uncle, or cousin, the widow was entitled to all of the personal estate and two-thirds of the real estate.⁶³ If the deceased was survived only by the widow she would, of course, take the entire estate.⁶⁴

2. *The Legislation of 1843*

In 1843, Indiana's law of dower was separated from its law regulating the descent of property.⁶⁵ In addition to this separation, the Indiana legislature chose to curtail the rights of widows to the property—both real and personal—of their deceased husbands.

The widow's share of personal property became nominally more complex under the 1843 statute. Like the 1838 statute, the widow was entitled to \$100 of the personal estate at valuation without regard to the claims of creditors.⁶⁶ The 1843 statute then provided a more detailed breakdown of the widow's portion of the personal estate: one-third if the intestate was survived by issue;⁶⁷ one-half if there was no issue and the intestate was survived by his father or any of the father's issue;⁶⁸ two-thirds if the intestate was survived by his mother but not his father or the father's issue;⁶⁹ and the entire personal estate if the intestate had no surviving issue, parents, or siblings.⁷⁰ Thus, in one situation—the survival of the intestate's father or any of the father's issue—the 1843 statute decreased the widow's share in her husband's personal estate, from two-thirds to one-half.

The widow's right to dower—a life estate in one-third of the real estate to which the husband was legally or equitably entitled—continued under this

⁶² REV. STAT. 1838, *supra* note 57, at 237. The widow also had the option in this situation of selecting dower rather than the amount of the estate provided by the statute. *Id.* Turnipseed indicates two reasons that a widow would select dower over the specific share provided by law: "(1) the inchoate rights inherent in dower that may lessen the ability of the spouse to transfer real property *inter vivos*, and (2) dower is given priority over creditors, which may protect the surviving spouse if the estate is insolvent." Turnipseed, *supra* note 59, at 747 n.78.

⁶³ REV. STAT. 1838, *supra* note 57, at 237.

⁶⁴ *Id.* at 238.

⁶⁵ REV. STAT. 1843, *supra* note 61, at 427–32 (dower); *id.* at 432–40 (descent).

⁶⁶ *Id.* at 554.

⁶⁷ *Id.* at 552.

⁶⁸ *Id.*

⁶⁹ *Id.* at 552–53.

⁷⁰ *Id.* at 553.

statute.⁷¹ The legislature added to the statute provisions regarding procedure for the election of dower, but the portion set aside for the widow remained the same.⁷² The widow also had the option of taking as an heir in the following situations: if the only heirs were the intestate's grandparents, aunts, uncles, or descendants of aunts or uncles, the widow was entitled to one-third of the real estate; if the inheritance descended as far as the "nearest of kin in equal degree of consanguinity to the intestate," the widow could take one-half of the real estate; if there were no heirs entitled to the estate the widow would take the entire estate.⁷³ Thus, the 1843 scheme diminished the rights held by a widow under the scheme of 1838: she no longer had the option to choose one-third of the real estate in fee simple when her husband died with no issue, and when her husband was survived by at least one grandparent, aunt, uncle, or cousin her option to elect real estate was cut from two-thirds to one-third.

Stepping for a moment outside of the context of intestacy, the Indiana legislature for the first time mandated that a widow must elect between dower and a devise made to her in her husband's will, and that "she shall not be entitled to both, unless it plainly appears by the will to have been the intention of the testator that she should have [the devise] in addition to her dower."⁷⁴ This provision was at issue in at least three cases before the Indiana Supreme Court. In *Ostrander v. Spickard*, Matilda Ostrander, widow of John Spickard, executed an instrument in 1840 by which she relinquished all rights and claims "by dower or otherwise, upon the estate of my late husband, the said John Spickard, deceased, personal; except those provisions contained and made for me in said will."⁷⁵ In the original instrument, the words "both real and" appeared before the word "personal" and had been stricken out.⁷⁶ The Court held that under English and Indiana law prior to the statutory revision of 1843, a widow could be compelled to elect between dower and a testamentary devise or gift only if taking dower would overturn the will or where the will stated that the devise or gift was in satisfaction of dower.⁷⁷ Because the case was not governed by Indiana's 1843 law, and because the language of the will did not require election, the widow was entitled both to her dower and to the gift provided for her in her deceased husband's will.⁷⁸ When facing a similar issue in *Kelly v. Stinson*, the Indiana

⁷¹ REV. STAT. 1843, *supra* note 61, at 428.

⁷² *Id.* at 428–32.

⁷³ *Id.* at 437.

⁷⁴ *Id.* at 431.

⁷⁵ *Ostrander v. Spickard*, 8 Blackf. 227, 227 (Ind. 1846).

⁷⁶ *Id.* at 228.

⁷⁷ *Id.* at 228–29.

⁷⁸ *Id.* at 229.

Supreme Court complemented its earlier decision in *Ostrander* by adding that taking both dower and a testamentary devise was appropriate “whether the devise was of lands, or of annuities charged on the lands liable to dower,” and that when assertion of the right to dower was inconsistent with only part of the lands devised, “that the widow was not barred of her dower in the residue.”⁷⁹

The Indiana Supreme Court confirmed the plain meaning of the 1843 statute in *Smith v. Baldwin*.⁸⁰ In *Smith*, testator William H. Smith left to his widow, Margaret Smith, beds and bedding, cupboard ware, a colt, and \$1000; the will did not mention dower.⁸¹ The lower court dismissed the widow’s bill for dower, and the Indiana Supreme Court affirmed, holding that the 1843 statute meant that

where a provision is made for the widow in lieu of dower in her deceased husband’s will, she shall elect between such provision and dower, and shall not take both; and that where the will is not explicit as to whether such provision is intended to be in lieu of dower, it shall be presumed to be so intended.⁸²

Since the widow had not relinquished the will and elected to take dower, the Court held that her bill had been property dismissed.⁸³

3. *The Legislation of 1852*

The Indiana legislature passed another statute regulating the descent of estates on May 14, 1852.⁸⁴ The Act took effect on May 6, 1853.⁸⁵ This statute greatly increased the widow’s share of her husband’s real and personal estate; it also abolished dower.⁸⁶ In its place the legislature gave to the widow

⁷⁹ Kelly v. Stinson, 8 Blackf. 387, 392 (Ind. 1847).

⁸⁰ Smith v. Baldwin, 2 Ind. 404 (Ind. 1850).

⁸¹ *Id.* at 405.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ REV. STAT. 1852, *supra* note 61, at 248–56.

⁸⁵ Hendrickson v. Hendrickson, 7 Ind. 13, 16 (Ind. 1855).

⁸⁶ REV. STAT. 1852, *supra* note 61, at 250. Factors contributing to the decline of dower included its limited usefulness if the husband’s wealth consisted of something other than land, its prejudicial effect on creditors, and public policy that favored an active real estate market, since the widow’s right to dower in conveyed land clouded title. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 322–23 (3d ed. 2005). Indiana may have abolished dower as early as it did precisely because its wealth consisted of land. *Id.* at 323. Ariela Dubler challenges this traditional understanding of dower’s decline, focusing as it does on male concerns over property, by insisting that women—far from being spectators whose rights were altered incidental to the actions of men—

the right to one-third of her husband's real estate in fee simple, free from obligations to creditors.⁸⁷ In addition, if the decedent had only one child, the real estate was divided equally between widow and child.⁸⁸ If a husband died intestate with no issue, the widow received three-fourths of the real estate, and if the entire estate did not exceed \$1,000, the widow would take the whole estate.⁸⁹ If the intestate died with no issue and no father or mother, the entire estate went to the widow.⁹⁰ Regardless of how many heirs were alive, if the value of the entire estate did not exceed \$300 the whole went to the widow in trust for her and the infant children of the deceased.⁹¹ The 1852 legislation thus protected the real property interest of widows to a greater extent than earlier Indiana law had.⁹²

contributed to legal change by challenging dower on the grounds of equality, family privacy, and the reality of cruel husbands who contributed to their widows' poverty. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1671–82 (2003). This supplement to the traditional account of dower's decline is probably relevant to the Indiana legislature's abolition of dower, because the push for women's rights was active in this period—Indiana's first women's rights convention was held in 1851. Ellen D. Swain, *From Benevolence to Reform: The Expanding Career of Mrs. Rhoda M. Coffin*, 97 IND. MAG. HIST. 190, 201 (2001).

⁸⁷ REV. STAT. 1852, *supra* note 61, at 250; *see also* *Pifer v. Ward*, 8 Blackf. 252 (Ind. 1846) (widow's right of dower superior to a mechanic's lien that arose after debtor's marriage). Although the facts of *Pifer* pertain to dower, the 1852 Indiana legislature cited it as relevant to its provision for the widow's share as against creditors. This provision was subject to some economic limitations. If the real estate exceeded \$10,000 in value, the widow was entitled to only one-fourth; if it exceeded \$20,000 the widow would receive one-fifth, free of the demands of creditors. REV. STAT. 1852, *supra* note 61, at 250.

⁸⁸ *Id.* at 251.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 250.

⁹² The 1852 legislation protected the interest of a widow whose husband died intestate, as well as one whose husband might attempt to disinherit her under a will (or one who died insolvent, given the protection from creditors). *Id.* The statute thus served a purpose similar to that of the modern spousal elective share. *See* UNIF. PROBATE CODE § 2-202 (amended 2008). The elective share allows a surviving spouse to take under the will, or to renounce the will and take a fractional share of the estate. DUKEMINIER ET AL., *supra* note 23, at 477. Dukeminier cautions that there is more variation on the elective share than on any other issue in estate law. *Id.* at 478. Reasons for this variation include: (1) beliefs about how much the surviving spouse deserves under circumstances such as length of marriage, the presence or absence of children, and his or her own wealth; (2) what property of the decedent's should be subject to the elective share; and (3) inability of legislatures to decide on the purpose of the elective share. *Id.* at 478–79. The latest amendments to the Uniform Probate Code favor a partnership view of marriage over a support view. UNIF. PROBATE CODE § 2-202 cmt., Purpose and Scope of Revisions (2009

The widow's share of her husband's personal estate also grew under the 1852 statute. The widow was now entitled to \$300 of the personal estate not subject to the demands of creditors.⁹³ In addition to this provision, if the intestate had two or fewer children, the widow and the children would share equally the personal estate; if there were more than two children, the widow would take no less than one-third.⁹⁴ If the decedent had no issue and was survived by either parent, the widow was to receive three-fourths of the personal estate.⁹⁵

IV. FINDINGS

This section presents and analyzes the data collected from the wills studied in this Note. First, this section gives attention to the identity of Hamilton County testators, the objects of their bounty (including an examination of how testators' widows were treated), estate distribution by testators with multiple children, and the use of trusts by testators. Having analyzed the testators, this section then compares the results of the study of Hamilton County testators to those testators studied in Davis & Brophy. Differences were found especially in the treatment of widows, the distribution of property among children, and the character of the trusts that testators created.

A. Testation in Hamilton County, Indiana

1. The Testators

The majority of Hamilton County testators in the period in question were males, who accounted for 84.0% (N=68) of testators studied, while women comprised just 16.0% (N=13).⁹⁶ This corresponds to the findings of virtually

Electronic Pocket Part Update). The partnership view of marriage holds that a surviving spouse has contributed to the wealth of the decedent, and so is entitled to a share of the deceased spouse's estate. *DUKEMINIER ET AL.*, *supra* note 23, at 477. Adoption of the partnership view helps to explain why the calculation of the surviving spouse's share is according to a sliding scale based on the length of marriage. UNIF. PROBATE CODE § 2-202(a). Indiana's current default elective share provision allows one-half of the net personal property and real estate for a surviving spouse. IND. CODE ANN. § 29-1-3-1 (LexisNexis 2009).

⁹³ REV. STAT. 1852, *supra* note 61, at 251.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See Appendix, Table 4.

every study of wills from the nineteenth century or earlier.⁹⁷ Most testators, 63.0% (N=51), were married.⁹⁸ A large majority of the testators—87.7%—had children in their wills (N=71).⁹⁹ Testators ranged from those having just one child to one testator who had at least fifteen children.

2. Testators' Objects of Bounty

The identity of Hamilton County testators' objects of bounty is not unexpected. Married testators most often left property to a surviving spouse and children, with far fewer leaving anything to close relatives (which includes grandchildren, siblings, and parents) or other persons.¹⁰⁰ Married testators faced choices about what portion of the estate, and what interest, to convey to the surviving spouse.¹⁰¹ Unmarried testators more often left property to close relatives and other persons.¹⁰²

a. Married Testators

All but one of the fifty-one married testators studied were male, and all included their surviving spouse in the will.¹⁰³ All but three, 94.1% (N=48), left something to a child or children.¹⁰⁴ About one in five, 20.0% (N=10), left property to close relatives—most often grandchildren.¹⁰⁵ These were sometimes children of a deceased child. Nehemiah Baker included in his will “the four children of my daughter Mary Swain . . . having one share among them.”¹⁰⁶ Jacob Cook left “to my two grandsons Nathan and Eli Puckett five dollars each to be paid them after their grandmother’s death out of the share of their mother Rebecca Puckett (deceased) and their sister Rebecca to have

⁹⁷ See Davis & Brophy, *supra* note 1, at 28 (16.1% women from 1831–1835; 13.9% from 1841–1845); Friedman, *supra* note 11, at 36 (3.3% women in 1850; 21.6% in 1875); Knaplund, *supra* note 2, at 14 (28% women).

⁹⁸ See Appendix, Table 8.

⁹⁹ See Appendix, Table 12.

¹⁰⁰ See Appendix, Tables 13–16.

¹⁰¹ See Appendix, Tables 17–20 & 21–24.

¹⁰² See Appendix, Tables 25–28.

¹⁰³ See Appendix, Table 16.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* For one married testator, it was indeterminable whether one person included in the will should be categorized as a close relative or other; hence the discrepancy in number and percentage.

¹⁰⁶ Nehemiah Baker’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 32, 32.

the remaining part of her deceased mother's share."¹⁰⁷ Andrew Fryberger directed that since

my son Andrew Jackson has lately deceased leaving a wife . . . Elizabeth [and she] has recently given birth to a male child who is not yet named, now, therefore, I do hereby give devise and bequeath to the said infant child of the said Elizabeth by my said son Andrew Jackson the sum of four hundred and twenty eight dollars and fifty seven cents to be paid as hereinafter directed . . .¹⁰⁸

Five testators, 10.0%, left part of the estate to other persons.¹⁰⁹ It is difficult to determine who the other persons were, because they are sometimes unaccompanied by any description other than a name. James Farley directed "that Elizabeth White have an equal share in the proceeds of the sale of land above described with my children."¹¹⁰ James B. Reynolds left one hundred dollars for the benefit of one Emeline Pond.¹¹¹ In one case, the person had moved in with the family of the testator—Philip Karr—who desired that "if Margaret Wyatt continue to reside in my family until she is eighteen years of age that my executors pay to her forty or fifty dollars as they may be able to do so."¹¹²

i. *Amount of Estate Left to Widow*

A great majority of married testators—80.4% (N=41)—left the entire estate to the surviving spouse.¹¹³ Four testators (7.8%) left greater than one-third (but less than all) of the estate to the widow, while just three (5.9%) left one-third or less.¹¹⁴ Hamilton County testators of this period, therefore, were apt to leave more to their widows than the widows would have received in

¹⁰⁷ Jacob Cook's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 181, 181.

¹⁰⁸ Andrew Fryberger's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 9, 10.

¹⁰⁹ Appendix, Table 16. See *supra* note 105 for the reason behind the discrepancy in number and percentage.

¹¹⁰ James Farley's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 165, 166.

¹¹¹ James B. Reynolds's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 84, 84.

¹¹² Codicil to Philip Karr's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 43, 45.

¹¹³ See Appendix, Table 20.

¹¹⁴ *Id.*

dower.¹¹⁵ Four testators, or 7.8%, did not indicate how much of the estate was left to the surviving spouse.¹¹⁶ In other words, it is unclear what percentage of the estate the surviving spouse received. For example, John Finch gave “to my wife Mahattable all my household and kitchen furniture, also one horse, at least one cow, eight sheep, and two hogs.”¹¹⁷ Finch left money to several children, and because it is difficult, if not impossible, to value Finch’s furniture, it is practically impossible to say what percentage of the estate his widow was to receive. John Berreman directed “that five hundred—\$500.00—of my personal property be paid by my executors to my beloved wife Anne G. Berreman to remain her sole and absolute property.”¹¹⁸ In addition, Berreman gave a life estate to his wife in some of his real estate.¹¹⁹ Because Berreman does not indicate the size of the tract of land left to his wife, the size of her share in the estate is indeterminable.

ii. *Type of Estate Left to Widow*

(a) *Widowhood Estate*

What kind of estates did testators leave to the surviving spouse? The widowhood estate, in which the testator leaves property to the widow until she dies or remarries, was common among the testators studied. Twenty-four testators (47.1%) conveyed a widowhood estate to the surviving spouse.¹²⁰ The widowhood estate reflects a testator’s concern to keep property within the bloodline, as well as perhaps “reluctance to accept the idea of a wife remarrying.”¹²¹ Some testators constructed the widowhood estate with basic formulaic language. William Parker directed “that my wife Emily Parker receive if she should survive me and so long as she shall remain my widow a direct maintenance of the proceeds of the last mentioned real estate.”¹²²

¹¹⁵ See *supra* Part III.B. This pattern of distribution to widows indicates that the 1843 legislation, which diminished the amount of the decedent’s estate to which the widow was entitled, did not reflect the actual practice of testators—or, at least the practice of Hamilton County testators.

¹¹⁶ See Appendix, Table 20.

¹¹⁷ John Finch’s Will, *supra* note 37, at 18.

¹¹⁸ John Berreman’s Will, *supra* note 44, at 134.

¹¹⁹ *Id.* at 134–35.

¹²⁰ See Appendix, Table 24.

¹²¹ FRIEDMAN, *supra* note 5, at 41. Friedman notes that testators would often set up the widowhood estate as a trust rather than leaving the widowhood estate property in the hands of the widow. *Id.* This practice among testators reflected not only a concern to keep estate property within the bloodline, but also “the idea that women had no head for managing money and other property.” *Id.*

¹²² William Parker’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD

James Farley gave full control of his real and personal estate to "my dear wife Nancy Farley . . . during her natural lifetime or remains [sic] my widow."¹²³ James Gray gave to his wife "in lieu of dower the use and occupancy and possession of all my real estate wherever situated during her natural life, provided she remain unmarried."¹²⁴

Other testators creating the widowhood estate further specified that the widow would receive something—whether by law or by the testator's choice—even if she were to remarry. Thus, John Newland directed that "my wife Martha Newland hold and possess so long as she remains my widow the farm in which I now live together with all the household goods and personal property . . . but if she marries I then will that she have her allowance according to law."¹²⁵ William Ridgeway, perhaps sounding both suspicious and bitter about the prospect of his widow's remarriage, gave all real and personal property to "my wife Sarah Ridgeway which she is to have her lifetime or as long as she remains my widow. But as soon as she marries another man all the property goes out of her hands . . . except the third of my estate which belongs to her."¹²⁶ A few testators chose to give money to widows who remarried. Christian Miller, having left all of his estate to his wife for her widowhood, directed that "should [my beloved wife Eve Miller] marry again I give her only one hundred and fifty dollars as her part of my estate"¹²⁷ William Hadley gave all of his real and personal property to his wife Deborah "as long as she remains my widow and at the expiration of that time it is my will that she have one hundred dollars worth of personal property"¹²⁸

The testator, in creating a widowhood estate, had to take special care in his use of language declaring what his widow would receive upon remarriage, especially if he meant to follow the traditional rationale for the widowhood estate.¹²⁹ In *Doe v. Kinney*, the Indiana Supreme Court had to

BOOK C 161, 161–62.

¹²³ James Farley's Will, *supra* note 110, at 165.

¹²⁴ James Gray's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 34, 34.

¹²⁵ John H. Newland's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 64, 64.

¹²⁶ William Ridgeway's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 67, 67.

¹²⁷ Christian Miller's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 29, 29.

¹²⁸ William M. Hadley's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 22, 22.

¹²⁹ On the traditional rationale behind the widowhood estate, see *supra* note 109 and accompanying text.

interpret a will that seemed to give the widow an incentive to remarry.¹³⁰ Josiah Rush's will provided a widowhood estate for his wife, Ann, but upon her remarriage "then, and in that case, the one-half of my estate to be divided equally between my brothers and sisters . . . and the other half I bequeath to my said beloved wife, Ann Rush."¹³¹ The court, following its ruling in *Doe v. Harter*,¹³² held that the use of the word "estate" in a will, "unaccompanied by any restriction or limitation, suffices to convey all the estate the testator had."¹³³ The petitioner appealed to the traditional rationale for the widowhood estate, contending that it was "inconsistent with the motives which influence the conduct of men to suppose the testator meant to give his widow a more valuable estate if she married again than if she remained single, and therefore, it should be inferred . . . that it was his intention to give her a life estate," but the court declined to attempt to ascertain the intentions of the testator outside of the ordinary meaning of the testator's words.¹³⁴

(b) *Life Estate*

The life estate was employed just as often as was the widowhood estate, with 47.1% (N=24) of testators leaving property to the surviving spouse for life.¹³⁵ The language creating the life estate is, of course, formulaic. Robert Ellis directed "that my property both real and personal shall be and remain the absolute property of my beloved wife Caroline Ellis during her natural life."¹³⁶ Some testators leaving life estates gave fuller descriptions of the property. For example, William Bradley devised:

Unto my beloved wife Mary Jane Bradley all my personal property of whatsoever description it may be whether it consists of goods, chattels, household furniture, stock, notes, choses in action; to the same and every part thereof to remain in her possession and under her sole control and management during her natural lifetime [And] the use, possession, rents, and profits of all my real estate, lands, and tenements with the

¹³⁰ *Doe v. Kinney*, 3 Ind. 50 (Ind. 1851).

¹³¹ *Id.*

¹³² *Doe v. Harter*, 7 Blackf. 488, 490 (Ind. 1845) (holding that the introductory clause of a will together with the words bequeathing an "estate" were sufficient to show that testator had given an estate in fee).

¹³³ *Kinney*, 3 Ind. at 51.

¹³⁴ *Id.* at 51–52.

¹³⁵ See Appendix, Table 24.

¹³⁶ Robert Ellis's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 127, 127.

appurtenances during her natural life¹³⁷

(c) *Fee Simple*

Four testators (7.8%) left their entire estate to the surviving spouse in fee simple.¹³⁸ Isaac Hamman, despite having children, directed that “the whole of my property after the payment of [debts and expenses], real and personal including all monies, notes, accounts, and credits of every kind shall be and remain the property of my beloved wife Anna if she shall be living at the time of my decease.”¹³⁹ Louis Taylor willed that “the whole of my estate both real and personal . . . shall be and remain the absolute property of my beloved wife if she shall be living at the time of my decease.”¹⁴⁰ Melinda Bratton bequeathed to her husband Robert “all my interest and rights that is coming to me of my father’s . . . real estate yet intended forever to be his and his heirs.”¹⁴¹

b. *Unmarried Testators*

Of thirty unmarried testators, twenty-three (76.7%) left property to children.¹⁴² A majority of wills—58.6% (N=17)—included close relatives, most often grandchildren.¹⁴³ Elizabeth Teeters directed that “the first colt my mare has I do will and bequeath Stanton Teeters, son of Abraham Teeters, a little boy. I do also will and bequeath to Victory Teeters, daughter of James Teeters deceased, a little girl, one dollar.”¹⁴⁴ William Brown gave “ten dollars for each of the children of Silas Brown deceased, to wit, Charlett

¹³⁷ William Bradley’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 123, 123.

¹³⁸ See Appendix, Table 24.

¹³⁹ Isaac Hamman’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 48, 48.

¹⁴⁰ Louis Taylor’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 61, 61.

¹⁴¹ Melinda Bratton’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 215, 215.

¹⁴² See Appendix, Table 28.

¹⁴³ *Id.* For two unmarried testators, it was indeterminable whether one person included in the will should be categorized as a close relative or other person; hence the discrepancy in number and percentage. In the case of William McKinney it was not possible to determine the relationship to one Olley Rully, to whom McKinney gave five dollars. William McKinney’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 150, 150.

¹⁴⁴ Mrs. Elizabeth Teeters’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 15, 15.

Brown, Micajah Brown, Lewis Nelson Brown, and Rhoda Brown.”¹⁴⁵ Andrew McDaniel gave a life estate to his sister with the remainder to his grandson.¹⁴⁶

Far fewer testators (13.8%; N=4) left something to other persons.¹⁴⁷ Elizabeth Teeters left one dollar to her daughter-in-law “Elizabeth Teeters wife of James Teeters deceased.”¹⁴⁸ Two unmarried testators who either had no children or devised nothing to children left something to both close relatives and other persons. Thus, John Means left thirty-seven acres in Hamilton County to “Alexander Wilson son of Mary Jane Wilson of Montgomery County in the State—Kentucky,” and the balance of his estate to his brother, James.¹⁴⁹ Anslem Rayl left one dollar each to three brothers and three sisters.¹⁵⁰ The majority of Rayl’s estate—including personal property, money claims on other individuals, and a bond on one William

¹⁴⁵ William Brown’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 250, 250.

¹⁴⁶ Andrew McDaniel’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 177, 177. McDaniel left a special piece of land to his heirs:

I give devise and bequeath to my sister Mary Canby all my right, title interest and claim either in law or equity to a certain land warrant for one hundred and sixty acres of land or for any other number of acres granted and issued to me for services in the war with Great Britain known as the War of 1812, which warrant was issued to me under the “Act of September 1837”

Id. William Bradley also fought in the War of 1812, though he had not yet received a land warrant:

I do also direct that in case a land warrant shall have been granted to me or may hereafter be granted to me for my services as a soldier in the war with Great Britain declared by the United States on or about the 18th day of June AD 1812, that such land warrant shall be the sole and exclusive property of my son Elisha Bradley

William Bradley’s Will, *supra* note 137, at 124.

¹⁴⁷ See Appendix, Table 28. See *supra* note 143 for the reason behind the discrepancy in number and percentage.

¹⁴⁸ Mrs. Elizabeth Teeters’s Will, *supra* note 144, at 15.

¹⁴⁹ John Means’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 81, 81.

¹⁵⁰ Anslem Rayl’s Last Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 114, 114. Rayl’s family illustrates something of the geographical mobility possible at this historical moment in America—Rayl lists two of his brothers as located in North Carolina and one in Georgia. *Id.* Although Rayl does not indicate where he was born, it is possible that he had moved from North Carolina to Hamilton County. By 1850, there were 1060 Hamilton County residents who had been born in North Carolina. Gregory S. Rose, *Hoosier Origins: The Nativity of Indiana’s United States-Born Population in 1850*, 81 IND. MAG. HIST. 201, 206 (1985). This number accounted for 19.9% of non-Indiana, United States-born residents of Hamilton County. *Id.* at 208.

Stephens for the deed for a forty acre parcel of land—was left to one Matthew Parr, who was also named by Rayl to be his executor.¹⁵¹

3. *Testators' Estate Distributions*

Testators also faced choices about how to divide their estates between surviving children. This Note divides distribution into the categories of equal distribution, essentially equal distribution, and favored distribution. Although the categories are here treated as discrete classes of testators, the distinctions drawn—especially at the boundaries between classes—are more like a continuum. That is, it is sometimes difficult to distinguish between an equal distribution as against an essentially equal distribution, or between certain essentially equal distributions and some favored distributions.

a. *Equal Distribution*

Sixty-two testators had more than one child.¹⁵² Just over one-quarter of those testators (27.4%; N=17) distributed their property equally.¹⁵³ Robert Ellis directed that “all of my estate both real and personal that shall remain after the death of my beloved wife shall be equally divided amongst my children.”¹⁵⁴ John Helms desired that “my estate shall be equally divided between my children hereinafter named, to wit Jacob Helms, Polly Ann Abney, John E. Helms, Elizabeth Snotgrass, George R. Helms, Abraham Helms, Isaac Helms, Sally Lind and Nancy Olfrey, and Hester Ann Brown.”¹⁵⁵ William Ridgeway declared that at the death of his wife “if she remains my widow until death the property and money is to be divided equally between my children. And if she marries before her death the two-thirds of the property which is my will should go out of her hands and be divided equally between my children.”¹⁵⁶

b. *Essentially Equal Distribution*

Twelve testators (19.4%) may be said to have divided their estates in an essentially equal distribution.¹⁵⁷ An essentially equal distribution will vary

¹⁵¹ Anslem Rayl's Last Will, *supra* note 150, at 114.

¹⁵² See Appendix, Table 32.

¹⁵³ *Id.*

¹⁵⁴ Robert Ellis's Will, *supra* note 149, at 127.

¹⁵⁵ John Helms's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 69, 69.

¹⁵⁶ William Ridgeway's Will, *supra* note 126, at 67.

¹⁵⁷ See Appendix, Table 32.

only slightly between heirs. One way that a testator may essentially equally divide the estate is to give an equal amount to each child except those children who have already received their portions of the estate. In other words, the property is not equally distributed in the will itself, but there is some indication that the testator has combined an advancement with will distribution to give the same amount of property to each of his children.¹⁵⁸ Thus, William Brown gave to his son John "the sum of one dollar with what he has received of me as his full share of my estate both real and personal," and then to his daughters Nancy Lewis and Polly Olvey and son Nelson Brown an "equal share . . . after deducting ten dollars for each of the children of Silas Brown deceased."¹⁵⁹

Other testators may give slightly more to one child than to the rest, but the difference between them is negligible. For instance, Jesse Justice left his daughter a bed and bedding, and then divided his "wearing apparel" between his son and daughter.¹⁶⁰ Another example of slight variation is seen in the will of James Farley, who directed that his three oldest sons manage the farm so that all his minor children would receive an education.¹⁶¹ However, to his son Levi Farley, James Farley directed that he was to receive a good English education "to be paid out of the proceeds of the production of my farm," and that if there were no neighborhood school, that Levi could choose "such an institution of education as he may deem best."¹⁶² In this case, only Levi is given the choice of the best school he can find. Then, when Farley's youngest son, Thomas, was to turn fifteen, Farley directed that 160 acres of land be sold, with the proceeds divided equally between all his children.¹⁶³

Still another way that a testator could distribute property essentially equally is by specifying that the children will take at different times. Thus, Sidney Smith gave land to his son John Preston, who it appears would take upon Smith's death.¹⁶⁴ John was not to interfere with his mother's quiet occupancy of her life estate, but there is no indication that he would not take at his father's death.¹⁶⁵ Then at Smith's widow's death or remarriage, his daughters, Martha Ann, Lucinda, Caroline, and Parintha were to receive their inheritance "to be equal to the land left to my son John P. if there remain

¹⁵⁸ Under Indiana's intestacy scheme, advancements were to be set-off against a child's share. REV. STAT. 1843, *supra* note 61, at 439.

¹⁵⁹ William Brown's Will, *supra* note 145, at 250.

¹⁶⁰ Jesse Justice's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 98, 100.

¹⁶¹ James Farley's Will, *supra* note 110, at 165.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Sidney Smith's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 40, 40.

¹⁶⁵ *Id.*

enough for such purposes.”¹⁶⁶ Although this language is unclear as to whether each of Smith’s daughters would receive the same as John or whether their combined shares would equal John’s share, Smith further clarified that the amount was to be equal:

If [my wife remarries and there is not enough land for the daughters,] John shall as he may be able account to them—or they to him should the balance of the land and the personal property produce to each one a legacy greater than his—and should my wife Eliza remain a widow my will is that [at] her decease the final division of my estate be governed by the above principle so that each share be the same in point of value.¹⁶⁷

Therefore, although Smith intended that each of his children receive the same amount of his estate in point of value, his son John was to receive land earlier, and thus took property with the ability to produce income earlier than did his sisters.

c. *Favored Distribution*

i. *Generally*

More than half of the testators with more than one child (53.2%; N=33) favored one or more children in the distribution of their estates.¹⁶⁸ Some testators favored just one child. Mary Hayworth gave eighty acres to her son, Levi, who was to pay fifty dollars to Hayworth’s son, William, and daughter, Mary.¹⁶⁹ The rest of Hayworth’s property was to be equally divided between all her children.¹⁷⁰ Philip Karr left to his son Arthur two tracts of land, while his other three children, Walter, Rebecca E., and Philip W., were to share equally in the farm.¹⁷¹

A testator might favor one child because his other children had already received their portion of the testator’s estate. Henry Crull, having already given to his five other sons and three daughters the sum of \$250 each,

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 40–41.

¹⁶⁸ See Appendix, Table 32.

¹⁶⁹ Mary Hayworth’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 24, 24. Hayworth’s handwriting is difficult to read at this point. It may read either “my son William & daughter Mary” or “my son William’s daughter Mary.” *Id.* Hayworth’s will also mentions a son, George, so on either reading Hayworth had multiple children and favored Levi. *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Philip Karr’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 43, 44.

directed that his son, Daniel Crull, was to receive, subject to “the comfortable maintenance and support” of Crull’s wife, seventy-seven and one-half acres of land.¹⁷² Crull further provided that if Daniel did not wish to take the real property, then his executors were to pay Daniel \$250.¹⁷³ Thus, although it is clear that Crull intended that his children receive an equal share of his estate—\$250 or its equivalent in real property—the will itself is considered to contain a favored distribution because the other children receive their share before the testator’s death.

Other testators favored multiple children. For example, Elizabeth Teeters left \$750 to one of her sons, \$140 each to two other sons, \$50 each to her other four sons, \$100 each and an even share of the beds, bedding, and movable property to two of her daughters, and \$1 each to two other daughters.¹⁷⁴ The difference between what Teeters’s daughters received cannot be explained by marriage—one daughter who received one dollar was unmarried, while the other three daughters were married.¹⁷⁵ Thomas Bond gave to his son, Samuel, and daughter, Almarine Clark, one hundred dollars each, and then to his son, Augustine, and daughter, Mary Ann, the remainder of all of his real and personal property.¹⁷⁶ James B. Reynolds directed that one hundred dollars be laid out for his three youngest sons (and one Emeline Pond, whose relationship to the testator is unclear) for land.¹⁷⁷ At Reynolds’s wife’s death, the remainder of his estate was to be divided equally between each of his seven children.¹⁷⁸

Andrew Fryberger provides an example of the fine line between distributions that are considered either essentially equal or favored. Fryberger made specific calculations to ensure that each of his children received the equivalent of \$428.57.¹⁷⁹ One of Fryberger’s sons owed him \$300, so his debt was to be forgiven and he would receive \$128.57; Fryberger had advanced a tract of land worth \$300 to another son, and he would receive \$128.57; two of Fryberger’s daughters were each given a piece of land worth \$250 and \$178.57 in cash; still others received \$428.57 cash.¹⁸⁰ Two of

¹⁷² Henry Crull’s Last Will and Testament, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 2, 2.

¹⁷³ *Id.* at 3.

¹⁷⁴ Mrs. Elizabeth Teeters’s Will, *supra* note 144, at 15. Teeters also gave various cash or property to a daughter-in-law and two grandchildren, but measurement of distribution equality is limited to children. *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Thomas Bond’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 120, 120–21.

¹⁷⁷ James B. Reynolds’s Will, *supra* note 111, at 84.

¹⁷⁸ *Id.*

¹⁷⁹ Andrew Fryberger’s Will, *supra* note 108, at 9–13.

¹⁸⁰ *Id.*

Fryberger's sons, William and Andrew, were given Fryberger's home premises valued at \$1,600, the proceeds of which the sons were to use to take their own cash inheritance as well as to pay out to some of the other heirs.¹⁸¹ In other words, Fryberger arranged for each of his heirs to receive an inheritance valued at \$428.57, but in addition to such inheritance two of the sons would split Fryberger's home premises worth \$1,600.¹⁸² Although the value of the premises was likely depleted by the sons' use of it to pay other heirs, proper management of the premises would no doubt lead to further production of income beyond what the other heirs received.

The fact that a testator employed favored distribution need not lead to the conclusion that the testator was stingy toward his or her other children. Some testators, while favoring one or more children, nevertheless gave liberally to all heirs. Lovina Conner directed that her two eldest sons were to share equally in the proceeds from the sale of her personal property and "all the interest I may be entitled to in any land of which my father Jabes Winship died seized."¹⁸³ To her youngest son, Conner gave two lots of land in Noblesville.¹⁸⁴ John Berreman willed a tract of land to his wife for her lifetime; at her death it was to be sold and divided equally among his two sons and two daughters.¹⁸⁵ Berreman bequeathed the tract of land on which he lived to one of his daughters, and the adjoining tract to the other daughter; his sons received the remainder of his land and his railroad stock.¹⁸⁶ James Carey gave to his son, Allen, eighty acres subject to his wife's widowhood estate; his son, Peter, received eighty acres subject to his wife's life estate.¹⁸⁷ Carey's daughter, Sarah, was given forty acres and twenty-five dollars; daughter, Susannah, received forty-four acres; daughter, Polly, inherited forty acres and twenty-five dollars.¹⁸⁸ Susannah and Polly were also to share equally in Carey's personal estate.¹⁸⁹ These three daughters were then given

¹⁸¹ *Id.* at 11–12.

¹⁸² *Id.* at 9–13.

¹⁸³ Lovina Conner's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 79, 79.

¹⁸⁴ *Id.*

¹⁸⁵ John Berreman's Will, *supra* note 44, at 134–35.

¹⁸⁶ *Id.* at 135–36. See *supra* note 44 and accompanying text on the Peru and Indianapolis Railroad Company and its stock.

¹⁸⁷ James Carey's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 86, 86.

¹⁸⁸ *Id.* at 86–87. Carey initially left five dollars to Polly, but then later in the will references "the above mentioned twenty-five dollars." *Id.*

¹⁸⁹ *Id.* at 87. Carey's will originally provided that three of his daughters—Charity, Polly, and Susannah—were to share in the personal estate, but upon bequeathing forty acres to Charity in the second codicil to his will, Carey revoked all former wills with

an additional forty acres to be sold and equally divided between them.¹⁹⁰ A fourth daughter, Charity, was given forty acres.¹⁹¹

ii. *Favored Distribution and Gender*

A vast majority of testators (82.1%; N=23) fit the expected pattern of giving more of the estate to sons than to daughters.¹⁹² Christian Miller gave to his two sons "all my real estate to be equally divided between them both when they shall arrive at age or at the death of my wife."¹⁹³ To each of his two unmarried daughters Miller gave the same inheritance in the same language: "one bed and bedding worth fifteen dollars and fifteen dollars as her part of my estate at this time."¹⁹⁴ To each of two married daughters, Miller left one dollar.¹⁹⁵ William Bradley devised, at his wife's death, all real and personal property to his three sons, Ammon, Burton, and Elisha.¹⁹⁶ These three sons were to give to sons, Daniel and William, \$300 each and \$50 to son, Albert.¹⁹⁷ Ammon, Burton, and Elisha were also to give to each of Bradley's daughters, Irena Bradley and Cynthia Mulnic, "one good feather bed and bedding therefor."¹⁹⁸ William Parker directed that his son, Henry A. Parker, receive thirty acres, and that the remainder of his real estate be divided equally between his youngest sons, James Riley Parker and Francis Laban Parker.¹⁹⁹ These three were also to share equally the personal property at the death of Parker's widow.²⁰⁰ To his two eldest daughters, who were both married, Parker gave two dollars each; his two youngest daughters each received one feather bed and bedding.²⁰¹

Five testators (17.9%) favored daughters over sons.²⁰² To his daughter, May, James Kerr devised forty acres subject to the life estate of his widow;

respect to Charity. Second Codicil to James Carey's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 89, 89.

¹⁹⁰ Codicil to James Carey's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 88, 88.

¹⁹¹ Second Codicil to James Carey's Will, *supra* note 189, at 89.

¹⁹² See Appendix, Table 36. See Newell, *Inheritance on the Maturing Frontier*, *supra* note 12, at 283.

¹⁹³ Christian Miller's Will, *supra* note 127, at 29.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ William Bradley's Will, *supra* note 137, at 123.

¹⁹⁷ *Id.* at 123–24.

¹⁹⁸ *Id.* at 124.

¹⁹⁹ William Parker's Will, *supra* note 122, at 161.

²⁰⁰ *Id.* at 162.

²⁰¹ *Id.*

²⁰² See Appendix, Table 36.

to his daughter Jane, Kerr bequeathed forty acres also subject to a life estate.²⁰³ A married daughter received ten dollars.²⁰⁴ Kerr's son, Alexander, whom he appointed to be executor along with his wife, received nothing in the will.²⁰⁵ Nehemiah Baker gave to his daughter, Sarah Baker, (at the death of his widow) a life estate in his farm, as well as "all my household and furniture and family wagon and one horse and one cow and six sheep, two hogs of her choice with one hundred dollars in cash at the death of her mother."²⁰⁶ To his sons, Eli and Kinsley, Baker gave each one hundred dollars.²⁰⁷ Baker directed that the rest of his personal estate be divided equally between his seven living children (with one equal share going to the four children of a deceased daughter).²⁰⁸ Abner Barker's distribution of his rather modest estate favored one of his daughters over the rest of his children—to all four of his sons and three daughters Barker left five dollars each (with two of the sons each receiving a bed), but "to my daughter Phebe Barker five dollars, one milk cow, and all my household and kitchen furniture including beds, bed clothing, etc. except two beds which I otherwise dispose of."²⁰⁹ At the death of his wife, Thomas Heady divided his estate equally among his children and their heirs, "with the exception of my daughter July Ann is to have two hundred dollars more than the rest of my heirs in consequence of her lameness."²¹⁰

4. Trusts

A total of eighteen testators (22.2%; fifteen males, three females) created testamentary trusts.²¹¹ Unexpectedly, all of the trusts were what may be

²⁰³ James Kerr's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 186, 186–87.

²⁰⁴ *Id.* at 187.

²⁰⁵ *Id.* at 186–88. There is no indication in the will that Alexander Kerr had already received his inheritance, though the absence of such language of course does not necessarily mean that he had not received an advancement.

²⁰⁶ Nehemiah Baker's Will, *supra* note 106, at 32. At his daughter's death, the farm was to be sold and divided equally amongst any of his other six children who would still be living at that time. *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Abner Barker's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 175, 175.

²¹⁰ Thomas Heady's Last Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 152, 152.

²¹¹ See Appendix, Table 40. A testamentary trust refers to a trust that is created in a will. FRIEDMAN, *supra* note 5, at 112. Friedman points out that these trusts are, of course, irrevocable, since the trust is created only after the testator's death. *Id.* Friedman, though noting that "[a] trust is a trust is a trust," divides trusts into two categories according to

termed implicit trusts—that is, none of the testators who created a trust actually used the word “trust” in its creation.²¹² A few of the trusts are especially rudimentary, containing little more than a directive to give money to the beneficiary in installments.²¹³ Thus, Thomas Bond gave one hundred dollars to each of two of his children to be paid “in two equal installments of one and two years after my decease.”²¹⁴ William Bradley willed that three of his sons, at the death of his wife:

do pay to my sons Daniel Bradley and William Bradley each the sum of three hundred dollars and payable as follows, to wit two hundred dollars to be paid within one year after the death of my said wife, two hundred dollars within two years after her death and two hundred dollars within three years after the death of my said wife and in case of the death of the said Daniel or William before the death of my wife then the same payments are to be made

their purposes. *Id.* at 113–14. A dynastic trust is created for the purpose of perpetuating and controlling the estate for a long period of time. *Id.* at 113. With a dynastic trust the testator can control the contents of the trust past the lifetime of his or her children or even grandchildren, subject to how the testator’s state has treated the rule against perpetuities. *Id.* at 113–14. A caretaker trust provides for one who is not able to manage money for oneself (e.g., minor children, or one who is incompetent) and allows more flexibility than a guardianship. *Id.* at 113. These trusts are, by contrast, often short-term. FRIEDMAN, *supra* note 5, at 114. All of the trusts created by the wills analyzed in this Note employed caretaker trusts, but the trusts here are further classified according to the purpose given for the trust by the testator.

²¹² It was common for the Indiana Supreme Court to refer to such instruments as trusts whether the testator used the word or not. *See, e.g., Doe v. Lanisus*, 3 Ind. 441, 443 (Ind. 1852) (“[W]here there is merely a naked power to sell the estate and distribute the proceeds, it is not necessary that the executor should have the title to the estate to enable him fully to carry into effect the intentions of the testator. In that case, the legal estate will be divested the moment the executor executes his trust.”); *Kelly v. Stinson*, 8 Blackf. 387, 389–91 (Ind. 1847) (provision that testator’s wife “take the charge of my children and property, and manage as she thinks proper for the maintenance and comfort of my family so long as she shall live and remain my widow” taken to mean that the estate vested in the widow, “who is for the time being clothed with powers of administration under the will, in trust for the purposes thus indicated”); *McCord v. Ochiltree*, 8 Blackf. 15, 16–17 (Ind. 1846) (“all the remainder of my estate, to continue a permanent fund, and the interest to be applied to the education of pious, indigent youths, who are preparing themselves for the ministry of the Gospel” referred to by the court as a charitable trust).

²¹³ It might be argued that these are mere instructions to executors, but they are classified as trusts here because the executor is directed to hold the payments for disbursement to the beneficiaries over time. This conclusion is supported by the Indiana Supreme Court’s statement in *Lanisus* that “a mere direction to an executor to sell lands for the purpose of paying legacies or making distribution, does not vest any title to the land in the executor” but rather creates a trust for the executor to execute. 3 Ind. at 443.

²¹⁴ Thomas Bond’s Will, *supra* note 157, at 120.

to the heirs . . . at law of such deceased son.²¹⁵

And William Brown directed that his:

real property [be] sold at one third of the price thereof to be paid in twelve months after the day of sale and the remainder in two installments, one half in two years after said sale and the last to be paid in three years from the day of sale.²¹⁶

More than one-third of the testators creating trusts (38.9%; N=7) did not detail a purpose for the trust.²¹⁷ John Berreman directed that his executors “pay that portion of my said estate to the proper guardian of my said sons Ira K. and Alexander S. to be put at interest as soon as possible and to be paid to them when they shall respectfully arrive at the age of twenty-one years.”²¹⁸ Lovina Conner willed that “the house and other improvements . . . on said lots should be completed and the same shall be leased or rented out by my executor for the use and benefit of my said son Austin Bishop Fallis the proceeds to be paid to him when he may become of age.”²¹⁹ Eve Beaver directed that:

the farm I now live on be rented out until my son Henry becomes twenty-one years of age, I will that the tax and keeping in repair of said farm be deducted out of the rents of said farm and the balance of the rent be equally divided between my son Henry and my daughter Margaret’s three children to wit Elizabeth, Sarah, and Levi, until my son Henry becomes twenty-one years of age²²⁰

Those specifying a purpose for the trust most often intended them to be used for either general support or education. Six testators (33.3% of those creating trusts) intended the trust for general support.²²¹ For example, William McKinney declared that “all the residue of my goods together with the real estate I will for the support of Robert McKinney my son.”²²² John Helms willed that his executors “shall rent the above named farm and place where I now live and the rents and profits thereof after keeping up said farm

²¹⁵ William Bradley’s Will, *supra* note 137, at 123–24.

²¹⁶ William Brown’s Will, *supra* note 145, at 250–51.

²¹⁷ See Appendix, Table 44.

²¹⁸ John Berreman’s Will, *supra* note 44, at 136.

²¹⁹ Lovina Conner’s Will, *supra* note 183, at 79.

²²⁰ Eve Beaver’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 95, 95–96.

²²¹ See Appendix, Table 44.

²²² William McKinney’s Will, *supra* note 143, at 150.

shall go to the support of my wife as above stated.”²²³

Not quite half of the testators who employed a trust (44.4%; N=8) directed that it be used for education.²²⁴ James Gray directed that “moneys coming into hands of my said executrix either from the sale of real estate or personal property or otherwise as much as may be necessary for that purpose to be applied and used in the education of my said children.”²²⁵ The specificity with which a trust for education was created varied from a mere phrase to rather well-defined instructions about the type and location of education. Thus, Sidney Smith provided for his children’s education in three words, ordering that his personal property be sold and the proceeds applied to funeral expenses, paying debts, and “schooling my children.”²²⁶ James Farley, on the other hand, directed that his son Levi:

be educated with a good English education the expense of which is to be paid out of the proceeds of the production of my farm. If there is no school in the immediate neighborhood of my family so he can board with them then he may choose for himself such an institution of education as he may deem best, taking into consideration the cheapest and least expense possible; all such necessary expenses to be paid out of the proceeds of the farm.²²⁷

One testator (5.6%) created a charitable trust.²²⁸ In what may arguably be the most interesting feature of the entire set of wills studied, William Bundrum directed that one hundred dollars “be placed in the hands of Micajah C. White or Aaron V. Talbert for the purpose of aiding or assisting destitute fugitive slaves on their way in making their escape from slavery to a land of liberty—to Canada.”²²⁹

²²³ John Helms’s Will, *supra* note 155, at 69.

²²⁴ See Appendix, Table 44.

²²⁵ James Gray’s Will, *supra* note 124, at 35.

²²⁶ Sidney Smith’s Will, *supra* note 164, at 40.

²²⁷ James Farley’s Will, *supra* note 110, at 165.

²²⁸ See Appendix, Table 44. On the rarity of a testamentary charitable trust, see FRIEDMAN, *supra* note 5, at 140–41.

²²⁹ William Bundrum’s Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 183, 183. On Hamilton County participation in the underground railroad from this period, see Julia S. Conklin, *The Underground Railroad in Indiana*, 6 IND. MAG. HIST. 63, 66–74 (1910) (chronicling various incidents related to the underground railroad in the Hamilton County town of Westfield, and specifically mentioning Micajah White by name); Allen Safianow, “*You Can’t Burn History*”: *Getting Right with the Klan in Noblesville, Indiana*, 100 IND. MAG. HIST. 109, 113–15 (2004) (providing examples of racial tolerance from this period in the context of the paradoxical and complex history of race relations in Noblesville—which became in the 1920s a bastion for the Ku Klux Klan).

Many of the trusts were created for the testator's child or children. Thus, Charles Heady willed that "all the proceeds of my estate to be loaned at interest and the proceeds to be applied to the education of my dear beloved child Nancy Ann Heady while her minority."²³⁰ William Hadley willed that his wife "have the use and benefit of [the] farm to raise and educate my children until my son Thomas arrives to the age of twenty-one years."²³¹ John Newland directed:

that what property [my wife] may be disposed to sell at my decease that the proceeds of the same with all notes and accounts be put in safe keeping by my executors to be applied as needed to pay tax and school my children, and other necessary purposes as they need for their raising.²³²

John Means was the only testator to create a trust for someone else's child.²³³ Means authorized his brother:

to take possession of the land above bequeathed to Alexander B. Wilson and superintend the same for the benefit of said Alexander until he shall become of age, and have the rents and profits applied to the further improvement of the same or to the support and education of said Alexander as may be thought best.²³⁴

One testator, Andrew Fryberger, created two trusts. Fryberger directed that his three grandchildren would share in "six several promissory notes . . . each being for the sum of fifty dollars . . . which said notes I devise my administrator . . . to collect and pay over to them or their proper guardian so that the annual interest on the same may be applied to their education."²³⁵ Fryberger also willed that two of his sons, who were to have control of the farm and to pay his heirs from the proceeds of the farm, should:

pay to the mother or guardian of [a previously mentioned, unnamed] infant child for its support to the annual interest on said sum of \$428.57 at the rate of four percent, the first year's interest to be paid within one year from my decease and so on yearly so long as said child shall live or until the

²³⁰ Charles H. Heady's Will, in HAMILTON COUNTY CIRCUIT COURT WILL RECORD BOOK C 108, 108.

²³¹ William M. Hadley's Will, *supra* note 128, at 22.

²³² John H. Newland's Will, *supra* note 125, at 64.

²³³ Means created a trust for "Alexander Wilson, son of Mary Jane Wilson, of Montgomery County in the State of Kentucky." John Means's Will, *supra* note 134, at 81. Means did not further specify the nature of his relationship to Ms. Wilson, so it is unclear whether she was Means's blood relative.

²³⁴ *Id.* at 81-82.

²³⁵ Andrew Fryberger's Will, *supra* note 108, at 9.

principle [sic] shall be paid.²³⁶

B. *Comparing Testation in Hamilton County, Indiana and Greene County, Alabama*

This section turns to a comparison between the testators of Hamilton County, Indiana in the period 1838 to 1857, and those of Greene County, Alabama from 1831 to 1835 and 1841 to 1845. Certain similarities between testators are bound to occur. Because of the lesser status accorded to women by the law in antebellum America, one expects a similar gender ratio between northern and southern testators.²³⁷ Similarities also exist between objects of bounty of married testators (Spouse: 100% to 98.5%; Children: 94.1% to 85.0%; Close Relatives: 20.0% to 23.8%; Other Persons: 10.0% to 13.4%).²³⁸

Having sketched the similarities between testators, the remainder of this section examines the differences between testators—focusing on patterns of distribution to widows and the purpose for which trusts were employed—and offers tentative reasons for the differences.²³⁹ The greater wealth found in Greene County seems to explain some of the differences between Hamilton and Greene County testators, but it is also likely that the active role played by women in farm communities contributes to the difference in treatment of widows.²⁴⁰

²³⁶ *Id.* at 11–12.

²³⁷ See *supra* note 97 and accompanying text.

²³⁸ For Hamilton County testators, see Appendix, Table 16. For Greene County testators, see Greene County, Greene County Demographic Tables of Testators, tbl. 12, <http://blurbawg.typepad.com/files/greencountytables2-1.doc> [hereinafter Greene County Tables]. All percentages refer first to Hamilton County and then to Greene County.

²³⁹ There was also wide variation between Hamilton and Greene County testators when measuring distribution to children. There was far more favored distribution among Hamilton County testators (53.2% to 17.9%), and correspondingly far less equal distribution (27.4% to 82.1%). This Note also accounted for essentially equal distribution by Hamilton County testators (19.4%; Appendix, Table 32). Because of the extra category—“essentially equal”—added by this Note, and because the present author would have expected much higher favored distribution in Greene County, this Note passes over an analysis of the reasons for this difference. Formulating a hypothesis will require more sophisticated statistical analysis than this author is capable of providing.

²⁴⁰ Some Greene County testators held more than 100 slaves. Davis & Brophy, *supra* note 1, at 3. None of the Hamilton County testators approached that level of wealth in this period.

1. *Treatment of Widows*

There were two conspicuous differences in distribution to widows. First, concerning the portion of the estate given to the widow, far more Hamilton County testators left the entire estate to the widow (80.4% to 35.8%).²⁴¹ Second, a much larger percentage of Hamilton County testators gave the widow either a widowhood estate (47.1% to 35.8%) or a life estate (47.1% to 38.8%) as opposed to a fee simple (7.8% to 23.9%).²⁴² The data suggest that the most common distribution to Hamilton County widows was a widowhood or life estate in the testator's entire estate, while Greene County widows were likely to receive a widowhood estate, life estate, or fee simple in something less than the entire estate.

What accounts for such a difference? The disparity may well be explained by one of at least two reasons. First, it is possible that Hamilton County testators placed more confidence in the financial and managerial skills of their widows than did Greene County testators. Women in farm communities played an important role in production, and those children who still lived at the testator's home would likely continue to work the farm for their own livelihood as well.²⁴³ Thus, it may be assumed that many widows would be well equipped to carry on the business of the family farm, and their husbands were therefore comfortable leaving the estate to their widows.

Another possible explanation for the different treatment of widows is that Greene County testators were wealthier than their Hamilton County counterparts—cotton belt farmers were on average quite a bit wealthier than their northern counterparts.²⁴⁴ The purpose of the life estate (as well as the widowhood estate) was support of the widow for her lifetime (or widowhood). Greene County testators would be likely to leave less of the estate to their widows because they had a larger estate to leave. In other words, Greene County testators had estates large enough that a fraction of the estate would suffice to support the widow. By contrast, the smaller estates held by Hamilton County testators would often necessitate leaving the entire estate in the control of the testator's widow for her support.

²⁴¹ See Appendix, Table 20 (Hamilton County); Greene County Tables, tbl. 15 (Greene County).

²⁴² See Appendix, Table 24 (Hamilton County); Greene County Tables, tbl. 18 (Greene County).

²⁴³ SUSAN SESSIONS RUGH, *OUR COMMON COUNTRY: FAMILY FARMING, CULTURE, AND COMMUNITY IN THE NINETEENTH-CENTURY MIDWEST* 65–70 (2001).

²⁴⁴ ROBERT WILLIAM FOGEL, *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* 82 (1989).

2. Trusts

There is moderate variation in the purpose for which trusts were created. A somewhat higher percentage of Hamilton County testators created trusts for the purpose of educating children (44.4% to 35.7%); far fewer Hamilton County testators provided trusts for general support when compared to Greene County testators (33.3% to 76.1%).²⁴⁵ These numbers, however, may be somewhat misleading. A full 38.9% of Hamilton County testators who created trusts (N=7) did not specify a purpose.²⁴⁶ More broadly speaking, all of the trusts created by Hamilton County testators were caretaker trusts.²⁴⁷ The disparity between Hamilton County and Greene County testators creating trusts for general support is, therefore, likely not as great as it seems.

The frequency and sophistication of trusts are the characteristics wherein Hamilton and Greene County testators most differ. Hamilton County testators created far fewer trusts (22.2%) than did Greene County testators (38.1%).²⁴⁸ In addition, Greene County testators created trusts that were markedly more sophisticated than those created by Hamilton County testators. The trusts created by Hamilton County testators were predominantly simple instruments, though some admittedly required the more complex maintenance of various debt relationships and interest payouts.²⁴⁹ By contrast, Greene County testators created complex trusts, which included such features as restriction on the ability of creditors and husbands to reach trust assets, powers of appointment given to beneficiaries, protection of married daughters from profligate husbands, and various treatment of slaves.²⁵⁰ It is likely that differences in wealth explain the difference in the number and sophistication of trusts.²⁵¹ Greene County testators had more wealth, created trusts more often in order to manage that wealth, and, thus, required more sophisticated legal technology in order to dispose of that wealth in the ways they wished.

In sum, differences in wealth likely explain much of the difference

²⁴⁵ See Appendix, Table 44 (Hamilton County); Greene County Tables, tbl. 29 (Greene County).

²⁴⁶ *Id.*

²⁴⁷ On caretaker trusts, see *supra* note 211.

²⁴⁸ See Appendix, Table 40 (Hamilton County); Greene County Tables, tbl. 29 (Greene County).

²⁴⁹ See *supra* Part IV.A.4.

²⁵⁰ Davis & Brophy, *supra* note 1, at 34–41.

²⁵¹ A trust may be as sophisticated as it is needed to be. The trust is thus used not only for simple donative transfers, but also as an “instrument of commerce.” See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 167–85 (1997) (describing the array of commercial trusts used in the United States and explaining why the trust is so useful for commercial purposes).

between Hamilton County and Greene County testators. A study of probate in Hamilton County at a time in which its testators had equaled the wealth of Greene County testators from this period would help to confirm or repudiate the importance of differences in wealth. Furthermore, the crucial function of women in farm communities seems to have influenced the amount and type of estate that testators left to their widows.

V. CONCLUSION

This Note has focused on one antebellum Indiana county, but it has asked large-scale questions about how testators used the probate process. These large questions in a small context provide what is hoped to be the first of several studies of testation in the old Northwest. As a point of comparison, the findings of Stephen Davis and Alfred Brophy's study of testation in Greene County were used to ask questions about whether and how testation might differ between north and south prior to the Civil War. This comparison led to several conclusions: that Hamilton County testators were more likely to provide greater portions of their estates for their widows, probably because their estates were smaller and, hence, the entire estate was necessary to support the widow; that they were more likely to employ favored distribution among children, possibly because there was less wealth to spread around; and that the greater wealth of Greene County necessitated a more sophisticated legal technology, as seen in the creation and function of trusts in Greene County as compared to those in Hamilton County.

Yet, questions still remain. Because the intestate scheme of 1843 did not reflect the practice of testators, how much of an impact did the 1852 legislation have on how testators behaved? Did that legislation reflect more closely the practice of testators going forward from 1852, or did testators continue to outpace the legislature in terms of care for widows? And why did testator practices differ from legislation? Was it because their practices were more progressive, or were they simply unaware of what the law was? Why exactly did Hamilton County testators so often use favored distribution, and was this kind of distribution common in other farm communities throughout the old northwest? How far had the legal technology of the trust developed in the older, more advanced, and wealthier cities of the East Coast? How common were explicit trusts in those places at this time? When did the explicit trust finally become a tool used by Hamilton County testators? Was there a specific point at which the wealth in Hamilton County grew to a level where more sophisticated trusts were required? These last few questions raise the issue of the transmission of legal technology: specifically, when and how did the technology of the explicit trust make its way to Hamilton County? The answers to all these questions await further research and analysis.

APPENDIX: DATA TABLES

TABLE 1

TESTATORS BY GENDER, 1838–1842

	Male Testators	Female Testators
Total (8)	62.5% (5)	37.5% (3)

TABLE 2

TESTATORS BY GENDER, 1843–MAY 5, 1853

	Male Testators	Female Testators
Total (38)	92.1% (35)	7.9% (3)

TABLE 3

TESTATORS BY GENDER, MAY 6, 1853–1857

	Male Testators	Female Testators
Total (35)	80.0% (28)	20.0% (7)

TABLE 4

TESTATORS BY GENDER, 1838–1857

	Male Testators	Female Testators
Total (81)	84.0% (68)	16.0% (13)

TABLE 5

MARITAL STATUS OF TESTATORS, 1838–1842

	Married Testators	Unmarried Testators
Total (8)	37.5% (3)	62.5% (5)

TABLE 6

MARITAL STATUS OF TESTATORS, 1843–MAY 5, 1853

	Married Testators	Unmarried Testators
Total (38)	63.2% (24)	36.8% (14)

TABLE 7

MARITAL STATUS OF TESTATORS, MAY 6, 1853–1857

	Married Testators	Unmarried Testators
Total (35)	68.6% (24)	31.4% (11)

TABLE 8

MARITAL STATUS OF TESTATORS, 1838–1857

	Married Testators	Unmarried Testators
Total (81)	63.0% (51)	37.0% (30)

TABLE 9

TESTATORS WITH CHILDREN IN THE WILL, 1838–1842

	Testators with Children	Testators without Children
Total (8)	100.0% (8)	0.0% (0)

TABLE 10

TESTATORS WITH CHILDREN IN THE WILL, 1843–MAY 5, 1853

	Testators with Children	Testators without Children
Total (38)	86.8% (33)	13.2% (5)

TABLE 11

TESTATORS WITH CHILDREN IN THE WILL, MAY 6, 1853–1857

	Testators with Children	Testators without Children
Total (35)	85.7% (30)	14.3% (5)

TABLE 12

TESTATORS WITH CHILDREN IN THE WILL, 1838–1857

	Testators with Children	Testators without Children
Total (81)	87.7% (71)	12.3% (10)

TABLE 13

OBJECTS OF BOUNTY OF MARRIED TESTATORS, 1838-1842

	Spouse	Children	Close Relatives	Other Persons	Close Relatives/Other Persons (Indeterminate)
Male (3)	100.0% (3)	100.0% (3)	33.3% (1)	33.3% (1)	0.0% (0)
Female (0)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)
Total (3)	100.0% (3)	100.0% (3)	33.3% (1)	33.3% (1)	0.0% (0)

TABLE 14²⁵²

OBJECTS OF BOUNTY OF MARRIED TESTATORS, 1843-MAY 5, 1853

	Spouse	Children	Close Relatives	Other Persons	Close Relatives/Other Persons (Indeterminate)
Male (24)	100.0% (24)	91.7% (22)	17.4% (4)*	8.7% (2)*	4.2% (1)
Female (0)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)
Total (24)	100.0% (24)	91.7% (22)	17.4% (4)*	8.7% (2)*	4.2% (1)

²⁵² For an explanation of the discrepancy between number and percentage as indicated by the asterisks, see *supra* notes 105, 109.

TABLE 15

OBJECTS OF BOUNTY OF MARRIED TESTATORS, MAY 6, 1853–1857

	Spouse	Children	Close Relatives	Other Persons	Close Relatives/Other Persons (Indeterminate)
Male (23)	100.0% (23)	100.0% (23)	21.7% (5)	8.7% (2)	0.0% (0)
Female (1)	100.0% (1)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)
Total (24)	100.0% (24)	95.8% (23)	20.8% (5)	8.3% (2)	0.0% (0)

TABLE 16²⁵³

OBJECTS OF BOUNTY OF MARRIED TESTATORS, 1838–1857

	Spouse	Children	Close Relatives	Other Persons	Close Relatives/Other Persons (Indeterminate)
Male (50)	100.0% (50)	96.0% (48)	20.4% (10)*	10.2% (5)*	2.0% (1)
Female (1)	100.0% (1)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)
Total (51)	100.0% (51)	94.1% (48)	20.0% (10)*	10.0% (5)*	2.0% (1)

²⁵³ For an explanation of the discrepancy between number and percentage as indicated by the asterisks, see *supra* notes 105, 109.

TABLE 17²⁵⁴

DISTRIBUTION TO WIDOWS: PORTION OF THE ESTATE CONVEYED
TO THE SPOUSE AMONGST MARRIED TESTATORS, 1838–1842

	Entire Estate	Greater than 1/3	1/3 or Less	Did Not Provide
Male (3)	66.7% (2)	33.3% (1)	0.0% (0)	0.0% (0)
Female (0)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)
Total (3)	66.7% (2)	33.3% (1)	0.0% (0)	0.0% (0)

TABLE 18

DISTRIBUTION TO WIDOWS: PORTION OF THE ESTATE CONVEYED
TO THE SPOUSE AMONGST MARRIED TESTATORS, 1843–MAY 5, 1853

	Entire Estate	Greater than 1/3	1/3 or Less	Did Not Provide
Male (25)	75.0% (18)	8.3% (2)	8.3% (2)	12.5% (3)
Female (0)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)
Total (25)	75.0% (18)	8.3% (2)	8.3% (2)	12.5% (3)

²⁵⁴ For Tables 17–20, a testator may be included in more than one category. For example, a testator might leave some of his real property and all of his personal property to his wife, but it is impossible to value the separate devises in order to arrive at the total portion of the estate conveyed.

TABLE 19

DISTRIBUTION TO WIDOWS: PORTION OF THE ESTATE CONVEYED
TO THE SPOUSE AMONGST MARRIED TESTATORS, MAY 6, 1853–1857

	Entire Estate	Greater than 1/3	1/3 or Less	Did Not Provide
Male (23)	87.0% (20)	4.3% (1)	4.3% (1)	4.3% (1)
Female (1)	100.0% (1)	0.0% (0)	0.0% (0)	0.0% (0)
Total (24)	87.5% (21)	4.2% (1)	4.2% (1)	4.2% (1)

TABLE 20

DISTRIBUTION TO WIDOWS: PORTION OF THE ESTATE CONVEYED
TO THE SPOUSE AMONGST MARRIED TESTATORS, 1838–1857

	Entire Estate	Greater than 1/3rd	1/3rd or Less	Did Not Provide
Male (51)	80.0% (40)	8.0% (4)	6.0% (3)	8.0% (4)
Female (1)	100.0% (1)	0.0% (0)	0.0% (0)	0.0% (0)
Total (52)	80.4% (41)	7.8% (4)	5.9% (3)	7.8% (4)

TABLE 21

INTEREST CONVEYED TO THE SPOUSE, 1838–1842²⁵⁵

	Widowhood	Life Estate	Fee Simple	Not Specified
Male (3)	66.7% (2)	33.3% (1)	0.0% (0)	0.0% (0)
Female (0)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)
Total (3)	66.7% (2)	33.3% (1)	0.0% (0)	0.0% (0)

TABLE 22

INTEREST CONVEYED TO THE SPOUSE, 1843–MAY 5, 1853

	Widowhood	Life Estate	Fee Simple	Not Specified
Male (24)	45.8% (11)	50.0% (12)	8.3% (2)	4.2% (1)
Female (0)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)
Total (24)	45.8% (11)	50.0% (12)	8.3% (2)	4.2% (1)

²⁵⁵ For Tables 21–24, there may be more than one type of interest conveyed—e.g., a testator who gives a life estate in some land and a widowhood estate in other land, or a life estate in personal property and a widowhood estate in real property.

TABLE 23

INTEREST CONVEYED TO THE SPOUSE, MAY 6, 1853–1857

	Widowhood	Life Estate	Fee Simple	Not Specified
Male (23)	47.8% (11)	47.8% (11)	4.3% (1)	0.0% (0)
Female (1)	0.0% (0)	0.0% (0)	100.0% (1)	0.0% (0)
Total (24)	45.8% (11)	45.8% (11)	8.3% (2)	0.0% (0)

TABLE 24

INTEREST CONVEYED TO THE SPOUSE, 1838–1857

	Widowhood	Life Estate	Fee Simple	Not Specified
Male (50)	48.0% (24)	48.0% (24)	6.0% (3)	2.0% (1)
Female (1)	0.0% (0)	0.0% (0)	100.0% (1)	0.0% (0)
Total (51)	47.1% (24)	47.1% (24)	7.8% (4)	2.0% (1)

TABLE 25

OBJECTS OF BOUNTY OF UNMARRIED TESTATORS, 1838–1842

	Children	Close Relatives	Other Persons	Close Relatives/Other Persons (Indeterminate)
Male (2)	100.0% (2)	0.0% (0)	0.0% (0)	50.0% (1)
Female (3)	100.0% (3)	33.3% (1)	0.0% (0)	0.0% (0)
Total (5)	100.0% (5)	20.0% (1)	0.0% (0)	20.0% (1)

TABLE 26²⁵⁶

OBJECTS OF BOUNTY OF UNMARRIED TESTATORS, 1843–MAY 5, 1853

	Children	Close Relatives	Other Persons	Close Relatives/Other Persons (Indeterminate)
Male (11)	72.7% (8)	90.0% (9)*	30.0% (3)*	9.1% (1)
Female (3)	100.0% (3)	66.7% (2)	0.0% (0)	0.0% (0)
Total (14)	78.6% (11)	84.6% (11)*	23.1% (3)*	7.1% (1)

²⁵⁶ For an explanation of the discrepancy between number and percentage as indicated by the asterisks, see *supra* notes 143, 147.

TABLE 27

OBJECTS OF BOUNTY OF UNMARRIED TESTATORS, MAY 6, 1853–1857

	Children	Close Relatives	Other Persons	Close Relatives/Other Persons (Indeterminate)
Male (5)	60.0% (3)	40.0% (2)	0.0% (0)	0.0% (0)
Female (6)	66.7% (4)	50.0% (3)	16.7% (1)	0.0% (0)
Total (11)	63.6% (7)	45.5% (5)	9.1% (1)	0.0% (0)

TABLE 28²⁵⁷

OBJECTS OF BOUNTY OF UNMARRIED TESTATORS, 1838–1857

	Children	Close Relatives	Other Persons	Close Relatives/Other Persons (Indeterminate)
Male (18)	72.2% (13)	64.7% (11)*	17.6% (3)*	11.1% (2)
Female (12)	83.3% (10)	50.0% (6)	8.3% (1)	0.0% (0)
Total (30)	76.7% (23)	58.6% (17)*	13.8% (4)*	6.7% (2)

²⁵⁷ For an explanation of the discrepancy between number and percentage as indicated by the asterisks, see *supra* notes 143, 147.

TABLE 29

FAVORED VS. EQUAL DISTRIBUTION AMONGST MARRIED
AND WIDOWED TESTATORS WITH MORE THAN ONE CHILD, 1838–1842

	Favored Distribution	Essentially Equal Distribution	Equal Distribution
Male (4)	100.0% (4)	0.0% (0)	0.0% (0)
Female (3)	66.7% (2)	33.3% (1)	0.0% (0)
Total (7)	85.7% (6)	14.3% (1)	0.0% (0)

TABLE 30

FAVORED VS. EQUAL DISTRIBUTION AMONGST MARRIED
AND WIDOWED TESTATORS WITH MORE THAN ONE CHILD, 1843–MAY 5,
1853

	Favored Distribution	Essentially Equal Distribution	Equal Distribution
Male (27)	51.9% (14)	14.8% (4)	33.3% (9)
Female (2)	100.0% (2)	0.0% (0)	0.0% (0)
Total (29)	55.2% (16)	13.8% (4)	31.0% (9)

TABLE 31

FAVORED VS. EQUAL DISTRIBUTION AMONGST MARRIED
AND WIDOWED TESTATORS WITH MORE THAN ONE CHILD, MAY 6, 1853–
1857

	Favored Distribution	Essentially Equal Distribution	Equal Distribution
Male (23)	39.1% (9)	30.4% (7)	30.4% (7)
Female (3)	66.7% (2)	0.0% (0)	33.3% (1)
Total (26)	42.3% (11)	26.9% (7)	30.8% (8)

TABLE 32

FAVORED VS. EQUAL DISTRIBUTION AMONGST MARRIED
AND WIDOWED TESTATORS WITH MORE THAN ONE CHILD, 1838–1857

	Favored Distribution	Essentially Equal Distribution	Equal Distribution
Male (54)	50.0% (27)	20.4% (11)	29.6% (16)
Female (8)	75.0% (6)	12.5% (1)	12.5% (1)
Total (62)	53.2% (33)	19.4% (12)	27.4% (17)

TABLE 33

FAVORED DISTRIBUTION BY GENDER, 1838–1842²⁵⁸

	Male(s) Favored	Female(s) Favored
Male (4)	100.0% (4)	0.0% (0)
Female (1)	100.0% (1)	0.0% (0)
Total (5)	100.0% (5)	0.0% (0)

TABLE 34

FAVORED DISTRIBUTION BY GENDER, 1843–MAY 5, 1853

	Male(s) Favored	Female(s) Favored
Male (12)	83.3% (10)	16.7% (2)
Female (2)	100.0% (2)	0.0% (0)
Total (14)	85.7% (12)	14.3% (2)

²⁵⁸ For Tables 33–36, “favored” does not necessarily mean it was only one child, but only that one or more children of that gender were favored. Furthermore, the total number of favored distribution by gender will not necessarily equal the total number of testators who favored one or more children; some testators who distributed their property unequally had only sons or only daughters.

TABLE 35

FAVORED DISTRIBUTION BY GENDER, MAY 6, 1853–1857

	Male(s) Favored	Female(s) Favored
Male (9)	66.7% (6)	33.3% (3)
Female (0)	0.0% (0)	0.0% (0)
Total (9)	66.7% (6)	33.3% (3)

TABLE 36

FAVORED DISTRIBUTION BY GENDER, 1838–1857

	Male(s) Favored	Female(s) Favored
Male (25)	80.0% (20)	20.0% (5)
Female (3)	100.0% (3)	0.0% (0)
Total (28)	82.1% (23)	17.9% (5)

TABLE 37

USE OF TRUSTS, 1838–1842

	Explicit Trust	Implicit Trust	No Trust Employed
Male (5)	0.0% (0)	0.0% (0)	100.0% (5)
Female (3)	0.0% (0)	66.7% (2)	33.3% (1)
Total (8)	0.0% (0)	25.0% (2)	75.0% (6)

TABLE 38

USE OF TRUSTS, 1843–MAY 5, 1853

	Explicit Trust	Implicit Trust	No Trust Employed
Male (35)	0.0% (0)	31.4% (11)	68.6% (24)
Female (3)	0.0% (0)	0.0% (0)	100.0% (3)
Total (38)	0.0% (0)	28.9% (11)	71.1% (27)

TABLE 39

USE OF TRUSTS, MAY 6, 1853–1857

	Explicit Trust	Implicit Trust	No Trust Employed
Male (28)	0.0% (0)	14.3% (4)	85.7% (24)
Female (7)	0.0% (0)	14.3% (1)	85.7% (6)
Total (35)	0.0% (0)	14.3% (5)	85.7% (30)

TABLE 40

USE OF TRUSTS, 1838–1857

	Explicit Trust	Implicit Trust	No Trust Employed
Male (68)	0.0% (0)	22.1% (15)	77.9% (53)
Female (13)	0.0% (0)	23.1% (3)	76.9% (10)
Total (81)	0.0% (0)	22.2% (18)	77.8% (63)

TABLE 41

PURPOSE OF TRUSTS, 1838–1842²⁵⁹

	General Support	Educational	Charitable	No Purpose Given
Male (0)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)
Female (2)	0.0% (0)	0.0% (0)	0.0% (0)	100.0% (2)
Total (2)	0.0% (0)	0.0% (0)	0.0% (0)	100.0% (2)

TABLE 42

PURPOSE OF TRUSTS, 1843–MAY 5, 1853

	General Support	Educational	Charitable	No Purpose Given
Male (11)	54.5% (6)	63.6% (7)	0.0% (0)	18.2% (2)
Female (0)	0.0% (0)	0.0% (0)	0.0% (0)	0.0% (0)
Total (11)	54.5% (6)	63.6% (7)	0.0% (0)	18.2% (2)

²⁵⁹ For Tables 41–44, some trusts had more than one purpose.

TABLE 43

PURPOSE OF TRUSTS, MAY 6, 1853–1857

	General Support	Educational	Charitable	No Purpose Given
Male (4)	0.0% (0)	25.0% (1)	25.0% (1)	50.0% (2)
Female (1)	0.0% (0)	0.0% (0)	0.0% (0)	100.0% (1)
Total (5)	0.0% (0)	20.0% (1)	20.0% (1)	60.0% (3)

TABLE 44

PURPOSE OF TRUSTS, 1838–1857

	General Support	Educational	Charitable	No Purpose Given
Male (15)	40.0% (6)	53.3% (8)	6.7% (1)	26.7% (4)
Female (3)	0.0% (0)	0.0% (0)	0.0% (0)	100.0% (3)
Total (18)	33.3% (6)	44.4% (8)	5.6% (1)	38.9% (7)

